United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL WITH AFFIDAVIT OF MAILING

76-5026

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-5026

B

P/S

In The Matter

—of—

BANQUE DE FINANCEMENT, S.A.,

Debtor.

BANQUE DE FINANCEMENT, S.A.,

Appellant,

FIRST NATIONAL BANK OF BOSTON,

—*and*—

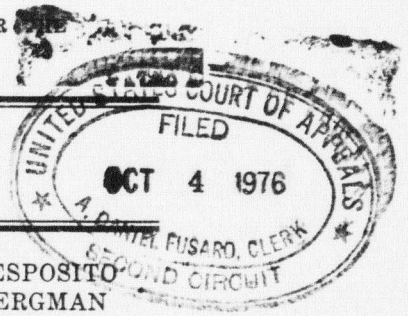
CHASE MANHATTAN BANK, N.A.,

Appellees,

FIRESTONE TIRE AND RUBBER COMPANY,

Intervenor in Support of Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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Docket Entries

Date *Proceedings*

5/ 5/75—Filed Petition under Chapter XI-322 proceedings, List of Creditors, Schedules of Assets, and referred to Bankruptcy Judge Babitt.

3/30/76—Filed NOTICE OF APPEAL TO DISTRICT COURT, from the order of Bank Judge Babitt dated 1/13/76, by Banque De Financement. RET: 5/11/76 at 10:30 A.M. in room 506.

3/30/76—Filed APPELLANT'S DESIGNATION of Contents for Inclusion in record on appeal and Statement of Issues to be presented on appeal. f.

4/14/76—Filed STIPULATION AND ORDER, extending time for the debtor-appellant to serve and file its brief on its appeal/So ordered lasker, dated 3/12/76. f.

4/22/76—Filed DEBTOR-APPELLANT'S BRIEF on appeal. f.

5/ 5/76—Filed STIPULATION AND ORDER adjourning the appeal to 6/8/76. So ordered Wyatt, J. dated 5/4/76. f.

6/ 8/76—Filed Stip. and Order of Adjournment Appeal by Banque De Financement, S.A. is Adjourned from June 8, 1976 to 6/22/76. So Ordered Gagliardi, J. Dated 6/7/76. f.

6/22/76—Filed Stipulation and Order, that the hearing of the Appeal, is adjourned from 6/22/76 to 7/13/76. So Ordered Knapp, J. dated 6/21/76. f.

7/ 8/76—Filed BRIEF ON APPEAL of respondent, the First National Bank of Boston. Sub By: Breed Abbott & Morgan. f.

7/ 9/76—Filed BRIEF ON APPEAL of respondent, the Chase Manhattan Bank, N.A. Sub By: Milbank, Tweed, Hadley & McCloy. f.

7/12/76—Filed APPELLANT'S REPLY BRIEF, Sub By: Ford, Marrin, Esposito, Witmeyer, & Bergman. f.

7/13/76—Filed SUPPLEMENTAL Memorandum on behalf of Bank Firestone LTD., in support of position of appellant.

Docket Entries

Date	*Proceedings*
7/14/76	Filed ORDER extending stay pending appeal, pending the determination by this court. So order Ward, J. dated 7/13/76. f.
7/28/76	Filed MEMORANDUM granting of the motion to dismiss on the second ground is affirmed & the stay is vacated. So ordered Ward, J. Dated 7/28/76. Copy to Bkcy. Judge Bread, Abbott & Morgan 1 Chase Man. Pl. NYC—Wachtell, Lipton, Rosen & Katz 299 Park Ave NYC—Cleary, Gottlieb, Steen & Hamilton 1 State St. Pl. NYC—Kelley, Drye & Warren 350 Park Ave. NYC 10004 White & Case 14 Wall St. NYC 10005—Milbank, Tweed, Hadley & McCloy 1 Chase Man. Pl. NYC 10005—Shearman & Sterling 53 Wall St. NYC 10005—Sullivan & Cromwell 48 Wall St. NYC 10005—Baker & McKenzie 375 Park Ave. NYC 10022—Zimet, Haines, Moss & Goodkind 460 Park Ave. NYC 10022—Coudert Bros. 200 Park Ave. NYC 10017— Proskauer, Rose, Goetz & Mendelsohn 300 Park Ave. NYC 10022—Spengler, Carlson, Gubar & Churchill 280 Park Ave. NYC 10017—Wick Riddell, Bloomer, Jacobi & McGuire 59 . n Lane NYC 10038—Bleakley, Platt, Sch. & Fritz 120 B'way, NYC 10005— Lovejoy, Wasson, Lundgren & Ashton 250 Park Ave. NYC 10017—Fox, Glynn & Melamed 299 Park Ave. NYC—Mudge, Rose, Guthrie & Alexander 20 Broad St. NYC 10005—Gruewald, Turk, Gillen & Ford 233 B'way. NYC 10007—Judge Babitt U.S. Courthouse 40 Center St. Room 202.
7/29/76	Filed NOTICE OF APPEAL to the USCA from the order of Ward, J. Dated 7/28/76. f. m/n

A True Copy

RAYMOND F BURGHARDT
Clerk

By .....
Deputy Clerk

THE PETITION (75 BKCY 764)

A3

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

REFEREE BABITT

- - - - - - - - - - - - - - - - x

In re		In Proceeding for
BANQUE DE FINANCEMENT, S.A.	:	An Arrangement
Debtor	:	No. 75 BKCY. 764
	:	PETITION

- - - - - - - - - - - - - - - - x

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

A petition of the Banque de Financement S.A. ("FINABANK"), a corporation of the Canton of Geneva, Confederation of Switzerland, engaged in the business of banking, respectfully represents:

1. Petitioner is a corporation organized under the laws of the Confederation of Switzerland and engaged in the banking business, with its post office address at 2, Rue de la Bourse, Geneva, Switzerland. Petitioner has not had its principal place of business or its principal assets in this district or any other district in the United States of America for the preceding six months or for a longer portion thereof. Petitioner has property and other assets in this district and by reason thereof this Court has jurisdiction, pursuant to the provisions of Section 2a (1) of the Bankruptcy Act and Rule 116 (a) (2) (b) of the Rules of Bankruptcy Procedure, effective October 1, 1973, which are applicable to Chapter XI proceedings pursuant to Sections 302 and 312 of the

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Bankruptcy Act and Rule XI-1 of the Bankruptcy Rules of the Southern District of New York.

2. On January 10, 1975, pursuant to the laws of Switzerland, pursuant to the direction of the Swiss Banking Commission petitioner filed a petition for a "sursis bancaire" (Postponement of Maturity) with the Premiere Section of the Court of Justice of the Canton of Geneva, Confederation of Switzerland. The petition contemplates the rehabilitation of petitioner, but has imposed a moratorium on petitioner's conduct of its business pending, among other things, a determination of petitioner's capability for rehabilitation.

3. On January 20, 1975, a mandate was made by the Court of Justice, Canton of Geneva, Confederation of Switzerland, constituting FIDES Societe Fiduciaire, a corporation organized under the laws of Switzerland with its place of business at Avenue de Champel 8c, 1206 Geneva, Switzerland as Commissaire Provisoire, or Temporary Commissioner, of Finabank. Pursuant thereto, FIDES Societe Fiduciaire has full authority to act on behalf of petitioner in the filing of this petition and in all matters related thereto.

4. Annexed hereto as Exhibit A, and expressly made a part hereof, verified by your petitioner's oath, is a list of creditors and, of such creditors so far as it is possible to ascertain, their places of residence. Further schedules and the statement of affairs will be filed as required by the Bankruptcy Act.

5. Annexed hereto as Exhibit B, and expressly made a part hereof, is a statement of petitioner's assets and the locations thereof. Detailed inventories of all property, personal and real, and such further statements concerning its property, as required by the Bankruptcy Act, and a full and true statement of all executory contracts will be filed within the time period prescribed by the provisions of the Bankruptcy Act.

6. Petitioner is qualified to file this petition and is entitled, as a debtor, to the benefits of the Bankruptcy Act.

WHEREFORE, petitioner prays that proceedings be had upon this petition in accordance with the provisions of Chapter XI of the Bankruptcy Act.

Dated: New York, New York
May 5, 1975

MUDGE ROSE GUTHRIE & ALEXANDER

By /John S. Kelley/
A Member of the Firm

Attorneys for Debtor
20 Broad Street
New York, New York 10005
Tel.: (212) 422-6767

A 6

VERIFICATION

CANTON OF GENEVA)
CONFEDERATION OF SWITZERLAND) ss.:

Frédéric HASLER and Willy BECKER, being duly sworn, jointly depose and say:

1. We are Manager (first-named) and Assistant Manager (second-named) of FIDES Société Fiduciaire, the Commissaire Provisoire of Finabank, the petitioner in the foregoing petition.

2. We do hereby swear that the statements contained therein, and in the annexed exhibits, are true to the best of our knowledge, information, and belief and that the filing of this petition on behalf of the debtor has been authorized.

Frédéric HASLER
Manager

Willy BECKER
Assistant Manager

igned and Sworn to before me by Mr Frédéric HASLER and Mr Willy BECKER this 2nd day of May, 1975

OLIVIER GAMPERT NOTAIRE A GENEVE

2 1975

EXHIBIT A

LIST OF CREDITORS

Due to Banks-Sight

Privat Kredit Bank, Zurich, Switzerland
Banca Solari & Blum S.A. Lugano, Switzerland
Continental Illinois National Bank & Trust Company of Chicago, Chicago, USA
Continental Illinois National Bank & Trust Company of Chicago, Geneva, Switzerland
Istituto per le Opere di Religione, Città del Vaticano
Bankhaus Wolff K.G., Hamburg, Germany
Skandinaviska Enskilda Banken, Stockholm, Sweden
Banca Privata Italiana, i.l. Milan, Italy
Generale Immobiliare Banking Corporation (Cayman) Ltd Grand Cayman, Cayman Islands
Chemical Bank, London, England

Due to Banks (Failure by Finabank to perform under forward foreign exchange contracts)

Firestone Bank, Zurich, Switzerland
Union de Banques Suisses, Chiasso, Switzerland
Crédit Lyonnais, Geneva, Switzerland
Deutsche Genossenschaftskasse Frankfurt, Germany
Hessische Landesbank Girozentrale, Frankfurt, Germany
Investitions und Handelsbank, Frankfurt, Germany
Ost-West Handelsbank, Frankfurt, Germany
Banque Belge pour l'Industrie, Brussels, Belgium
First National Bank of Boston, Paris, France
Banca di Credito di Milano, Milan, Italy
Banca Popolare di Milano, Milan, Italy
Banca Privata Italiana i.l., Milan, Italy
The Chase Manhattan Bank, Milan, Italy
Crédit Lyonnais, Luxembourg, Luxembourg

Due to Banks-Time

Banque Procrédit, Zurich, Switzerland
Istituto per le Opere di Religione, Città del Vaticano
Generale Immobiliare Banking Corporation (Cayman) Ltd Grand Cayman (Cayman Islands)

Demand Deposits

Time Deposits

Acceptances and Similar Engagements
in favor of Midland Bank Ltd, London

Sundry Liabilities

Taxes due
Legal fees and Invoices due

EXHIBIT B

SCHEDULE OF ASSETS

Cash on hand and due from Swiss National Bank and Postal Checking Account

Due from Banks-Sight

Banque Populaire Suisse, Geneva, Switzerland
Crédit Suisse, Geneva, Switzerland
Société de Banque Suisse, Basle, Switzerland
Société de Banque Suisse, Geneva, Switzerland
Société de Banque Suisse, Lausanne, Switzerland
Société de Banque Suisse, Zurich, Switzerland
Union de Banques Suisses, Chiasso, Switzerland
Union de Banques Suisses, Geneva, Switzerland
Union de Banques Suisses, Lausanne, Switzerland
Union de Banques Suisses, Zurich, Switzerland
Bankhaus I.D. Herstatt, Cologne, Germany
Bankhaus Wolff K.G., Hamburg, Germany
Albert H. de Bary, Amsterdam, Netherland
Banca Privata Italiana, Milan and Rome, Italy
Banca Commerciale Italiana, Milan, Italy
Banca Nazionale del Lavoro, Milan, Italy
Credito Lombardo, Milan, Italy
Istituto Bancario San Paulo di Torino, Milan, Italy
Banco Tornquist, Buenos Aires, Argentina
Bankers Trust Co., New York, USA
The Chase Manhattan Bank, New York, USA
Chemical Bank, New York, USA
Continental Bank International, New York, USA
Continental Illinois National Bank & Trust Company of Chicago, Chicago, USA
First National City Bank, New York
Irving Trust Company, New York, USA
Manufacturers Hanover Trust Co., New York, USA
Morgan Guaranty Trust Co., New York, USA
Generale Immobiliare Banking Corporation (Cayman) Ltd Grand Cayman, Cayman Islands

Due from Banks-Time

Crédit Suisse, Geneva, Switzerland
Swiss National Bank, Geneva, Switzerland

Loans, Overdrafts and Advances to Customers

Bills discounted
Overdrafts in current accounts
Term Loans

Mortgages

On one property in Geneva, Switzerland

EXHIBIT B (continued)

Investments and Securities on Deposit with following Correspondents:

in our own safe
Compagnie de Banque et d'Investissements, Geneva, Switzerland
Banca del Gottardo, Lugano, Switzerland
Swiss Credit Bank, Geneva, Switzerland
Swiss Bank Corporation, Basle, Switzerland
Banca Morgan Vonwiller, Milan, Italy
Vontobel & Co, Zurich, Switzerland
Clariden Bank, Zurich, Switzerland
Hentsch & Co., Geneva, Switzerland
Chemical Fund c/o Bradford Trust Co, New York, USA
Fidelity Fund c/Service Corp., Boston, USA
Fidelity Trend Fund c/o FMR Service Corp., Boston, USA
Supervised Investors Growth Fund c/o Data Sys Tance Inc., Kansas City/USA
Technology Fund c/o Data Sys Tance Inc., Kansas City, USA

Permanent Participations

Securities deposited with Banco del Gottardo, Lugano, Switzerland and Banca Morgan Vonwiller, Milan, Italy
Generale Immobiliare Banking Corporation (Cayman) Ltd, Grand Cayman, Cayman Islands
Bankhaus Wolff K.G., Hamburg, Germany

Bank Premises

Building at 2, Rue de la Bourse, Geneva, Switzerland

Due from Customer (unfulfilled forward exchange contracts)

MOTION OF FNBB TO DISMISS DATED JUNE 26, 1975

A 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

In re	:	In Proceedings For An Arrangement No. 75 B. 764
BANQUE DE FINANCEMENT, S.A.,	:	(RB)
Debtor.	:	NOTICE OF MOTION

- x

S I R S :

PLEASE TAKE NOTICE that, upon the Petition herein, the annexed affidavit of Thomas A. Shaw, Jr. sworn to June 26, 1975, upon the exhibits to such affidavit, upon the memorandum of law and further affidavits to be submitted herein, and upon all papers and proceedings herein, the undersigned on behalf of The First National Bank of Boston ("Boston Bank"), a scheduled creditor herein, will move this Court before the Honorable Roy Babitt, Bankruptcy Judge, at Room 201, United States Courthouse, Foley Square, New York, New York, on July 8, 1975 at 9:00 A.M. or as soon thereafter as counsel can be heard for an order:

1. Pursuant to Rule 914 of the Rules of Bankruptcy Procedure and Rules 12 and 56 F.R.C.P. and all other applicable rules and principles of law dismissing this proceeding and the voluntary Petition for relief pursuant to Chapter XI of the Bankruptcy Act, dated May 5, 1975 and filed by petitioner Banque De Financement, S.A. ("Finabank"), upon the grounds that:

(a) this Court lacks jurisdiction of the subject matter under the provisions of Section 323 of the Bankruptcy Act, Rules 11-6, 11-11 and 11-12

of the Rules of Bankruptcy Procedure and Official Form 11-F1 in that the Petition herein:

(i) fails to state that Finabank is insolvent or unable to pay its debts as they mature;

(ii) fails to set forth the provisions of the plan of arrangement proposed by it or to state that it intends to propose a plan of arrangement pursuant to the provisions of Chapter XI;

(iii) fails to annex the schedules and statement required to be filed pursuant to Rule 11-11(a) or a list of all its creditors pursuant to Rule 11-11(b);

(iv) fails to annex Exhibit A required to be annexed to Official Form 11-F1; and

(v) purports to be verified and filed on behalf of Finabank by a Swiss corporation which did not have the authority to do so;

(b) this Court lacks jurisdiction of the subject matter under the provision of Section 4(a) of the Bankruptcy Act in that Finabank is a banking corporation, and hence is not a "debtor" under Section 306(3) of the Act eligible to file a Petition for relief under Chapter XI; and

(c) alternatively, that if this Court finds that it has jurisdiction of the subject matter, the Petition herein should nevertheless be dismissed pursuant to Rules 119 and 11-17 of the Rules of Bankruptcy Procedure or in the exercise of discretion.

2. Providing for a schedule for the filing of additional affidavits and of briefs by the parties hereto; and

3. Granting Boston Bank such other and further relief as to the Court may seem just.

Dated: New York, New York
June 26, 1975

Yours, etc.,

BREED, ABBOTT & MORGAN

By /s/ THOMAS A. SHAW, JR.
A Member of the Firm
Attorneys for The First National
Bank of Boston
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New York, New York 10005
(212) 944-4800

WACHTELL, LIPTON, ROSEN & KATZ

By /s/ Leonard M. Rosen
A Member of the Firm
Attorneys for The First National
Bank of Boston
299 Park Avenue
New York, New York 10017
(212) 371-9200

TO:

MUDGE ROSE GUTHRIE & ALEXANDER
Attorneys for Banque de Financement, S.A.
20 Broad Street
New York, New York 10005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

In re	:	In Proceedings For An Arrangement No. 75 B. 764
BANQUE DE FINANCEMENT, S.A.,	:	(RB)
Debtor.	:	AFFIDAVIT

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

THOMAS A. SHAW, JR., being duly sworn, deposes and says:

1. I am a member of Breed, Abbott & Morgan, attorneys for The First National Bank of Boston ("Boston Bank"), a national banking association organized under the laws of the United States and having its principal place of business in Boston, Massachusetts.

2. This affidavit is submitted in support of Boston Bank's motion for an order pursuant to Rule 914 of the Rules of Bankruptcy Procedure and Rules 12 and 56 F.R.C.P. dismissing this proceeding and the voluntary petition (the "Petition") for relief pursuant to Chapter XI of the Bankruptcy Act, dated May 5, 1975 and filed by petitioner Banque De Financement, S.A. ("Finabank"), upon the grounds that:

(a) this Court lacks jurisdiction of the subject matter under the provisions of Section 323 of the Bankruptcy Act, Rules 11-6, 11-11 and 11-12 of the Rules of Bankruptcy Procedure and Official Form 11-F1 in that the Petition herein:

(i) fails to state that Finabank is insolvent

or unable to pay its debts as they mature;

(ii) fails to set forth the provisions of the plan of arrangement proposed by it or to state that it intends to propose a plan of arrangement pursuant to the provisions of Chapter XI;

(iii) fails to annex the schedules and statement required to be filed pursuant to Rule 11-11(a) or a list of all its creditors pursuant to Rule 11-11(b);

(iv) fails to annex Exhibit A required to be annexed to Official Form 11-F1; and

(v) purports to be verified and filed on behalf of Finabank by a Swiss corporation which did not have the authority to do so;

(b) this Court lacks jurisdiction of the subject matter under the provision of Section 4(a) of the Bankruptcy Act in that Finabank is a banking corporation and hence is not a "debtor" under Section 306(3) of the Act eligible to file a petition for relief under Chapter XI; and

(c) alternatively, that if this Court finds that it has jurisdiction of the subject matter, the Petition herein should nevertheless be dismissed pursuant to Rules 119 and 11-17 of the Bankruptcy Rules or in the exercise of discretion.

THE FACTS

A

BOSTON BANK'S INTEREST IN THIS PROCEEDING

3. Boston Bank's interest in this proceeding

arises out of its claim against Finabank for $9,176,375 damages for breach of two forward foreign exchange contracts. The said claim is the basis of an action for that sum now pending against Finabank in this Court, and of an attachment of Finabank funds pursuant to an order of attachment in the said action (The First National Bank of Boston v. Banque De Financement S.A., 75 Civ. 290).

4. Facts giving rise to Boston Bank's claim against Finabank are briefly stated as follows:

(a) On January 9, 1974, Boston Bank entered into a forward foreign exchange agreement ("Contract No. 1") with Finabank for the purchase by Boston Bank of 52,009,500 Swiss francs for a purchase price of $15,000,000 United States dollars, said purchase to be consummated and settled on January 13, 1975.

(b) On January 15, 1974, Boston Bank entered into a second forward foreign exchange agreement ("Contract No. 2") with Finabank for the purchase by Boston Bank of 34,260,000 Swiss francs for a purchase price of $10,000,000 United States dollars, said purchase to be consummated and settled on January 15, 1975.

(c) During 1974, the value of the dollar in relation to the Swiss franc fell precipitously. After hearing reports of a deterioration in Finabank's financial condition, Boston Bank sent a cable to Finabank on January 9, 1975 reminding Finabank of its contractual obligations and indicating to

Finabank that late performance by Finabank on either of the two contracts would be refused, because Boston Bank would be required to purchase Swiss francs at the market price to cover its own obligations in the event of any default by Finabank and that Finabank would be held liable for any damages resulting from such contingency.

(d) Finabank failed to perform either Contract No. 1 or Contract No. 2 and Boston Bank was required to and did purchase Swiss francs at the market to cover its own obligations.

(e) Because of the failure of Finabank to deliver to Boston Bank the Swiss francs it was obligated to deliver, Boston Bank sustained a loss of $9,176,375.58.

B

PROCEEDINGS PENDING IN THIS COURT INVOLVING FINABANK

(1) The Chase Manhattan Bank, N.A., v. Banque De Financement S.A.

5. On January 6, 1975 The Chase Manhattan Bank ("Chase") filed an action against Finabank in this Court (75 Civ. 39), now pending before Judge Werker seeking recovery of $491,000. Also on January 6, 1975 Chase obtained an order of attachment signed by Judge Griesa for the attachment of the said sum plus interest, costs and marshal's fees and thereafter on or about January 15, 1975 the attachment order was served on a number of banks in New York including Continental Bank International ("CBI") which, as hereafter set forth, held over $12,000,000 in the name of Finabank.

(2) The First National Bank of Boston v. Banque De Financement S.A.

6. On January 20, 1975, Boston Bank filed an action against Finabank, based upon the foregoing facts, in this Court entitled The First National Bank of Boston v. Banque De Financement S.A. (75 Civ. 290), which is now pending before Judge Weinfeld. On the same date, Judge Weinfeld signed an order of attachment in the sum of $9,176,375 plus interest, costs, disbursements, marshal's fees and expenses. The order of attachment, a copy of which is annexed as Exhibit A, was duly levied upon a number of banks in New York, including CBI, and thereupon in accordance with the order of attachment, Boston Bank brought on a "due process motion" before Judge Weinfeld to prove the attachment. In response to the said motion Finabank appeared by its present attorneys, Mudge Rose Guthrie & Alexander, asserted that CBI, at and since the time of levy of the attachment, "holds in Finabank's name approximately $12,000,000 of funds," and sought to have the attachment vacated. After hearing argument on the motion, Judge Weinfeld granted Boston Bank's motion sustaining the attachment and denied Finabank's application for dismissal, stating in relevant part in his decision dated February 18, 1975:

> "At the hearing on the motion, plaintiff established the grounds for the attachment, to wit, (1) two breach of contract claims, and (2) the need for the attachment to establish quasi in rem jurisdiction over defendant, a foreign corporation. Indeed, these grounds do not appear to be disputed.
>
> "This court is satisfied that an attachment order issued without prior notice in order to obtain quasi in rem jurisdiction over the defendant does not violate due process and comes within the

exception referred to in Fuentes v. Shevin, 407 U.S. 67, 82 (1972) and Sugar v. Curtis Circulation Co., 383 F.Supp. 643, 646 n.5 (1974).

"The foregoing disposition is without prejudice to the rights of third parties to any claimed interest in the attached funds."

No third parties have appeared to date in the action to assert any interest in the attached funds, although Finabank has claimed an interest in the funds in behalf of unnamed "customers" as more fully described infra, paragraph 15(d).

(3) Continental Bank International v. Banque De Financement, S.A., et al.

7. On January 21, 1975 CBI commenced an interpleader action against Finabank and others which is now pending in this Court before Judge Bonsal (75 Civ. 299). In its interpleader complaint, CBI alleged that it held, in the name of Finabank, the following:

(a) demand account - $941,590.53;

(b) special account - $2,245,310.00;

(c) No. 2 special account - $303,222.01; and

(d) certificates of deposit - "with maturity dates extending from January 22, 1975 through April 2, 1975" - $8,732,000.00.

8. CBI's complaint further alleged that, on January 7, 1975, the Swiss Federal Banking Commission ordered Finabank to suspend operations, that on January 8, and again on January 13, 1975, Finabank advised CBI that "the certificates [of deposit] and other items were placed by Finabank with CBI 'as Trustee of accounts of clients,' and Finabank asked CBI to transfer such properties to new accounts in the name of Finabank to be opened by Credit Suisse in Geneva, Switzerland." The complaint then alleged:

"28. On or about January 14, 1975 CBI asked Finabank for information regarding the nature of the alleged trustee relationships, the identity of the parties for whom the funds had allegedly been placed and other background information. CBI also asked Finabank at that time, among other things, to furnish copies of relevant trust documents and other appropriate documentation. On or about January 15, 1975 Finabank advised CBI that it would not furnish the requested information."

9. On the same date, January 21, 1975, CBI, in its interpleader action, obtained an order signed by Judge Pollack (to whom the interpleader action was originally assigned), a copy of which is annexed hereto as Exhibit B. Among other things, the said order required CBI to redeem each of the certificates of deposit on the date of maturity and deposit the proceeds in automatically renewable time deposits. On information and belief, all of the certificates of deposit have now matured, have been redeemed, and the cash proceeds are being held by CBI in automatically renewable time deposits. The said order further restrained all defendants "from prosecuting any proceeding to compel payment or delivery of any sums from the Fund other than in this interpleader action."

10. Judge Pollack's order also provided for service upon the named defendants and service by publication upon unknown claimants to the Fund (named in the summons and complaint as "John Doe"), by publishing a copy of his order in The American Banker for six consecutive weeks beginning January 24, 1975. This service by publication was completed in early March 1975. To date, apart from Boston Bank and Finabank, each of which have asserted their claims to the Fund, the following have asserted claims to the Fund:

1. American Creditors

(a) First National City Bank - $138,803.89;

(b) The Chase Manhattan Bank, N.A. - $491,000.00;

(c) Mario Einaudi and Manon Einaudi of Ithaca, New York - $35,000.00;

(d) Mario Einaudi, as Trustee U/W Michele Sicca of Ithaca, New York - $131,562.50; and

(e) Kidder, Peabody & Co., Inc. - no claim.

2. Foreign Creditors

(a) Brabant, S.A. (a Luxembourg corporation) - $60,200.00;

(b) Plascomera, S.A. (a Luxembourg corporation) - $39,496.89;

(c) Chantagoui Anstalt (a Lichtenstein corporation) - $330,136.20;

(d) Banca Privata in Lugano, S.A. (a Swiss corporation) - $77,650.00;

(e) Privat Kredit Bank (a Swiss corporation) - $19,750.00;

(f) Banque de la Suisse Italienne (a Swiss corporation) - $70,223.00;

(g) Union de Banques Suisse (a Swiss corporation) - $128,098.00, 19,931.52 Swiss francs, 8,218,000 Deutsche Marks;

(h) Swiss Bank Corporation (a Swiss corporation) - may make a claim; and

(i) Jose Fernandez-Beceiro (a resident of Spain) - $73,000.00

11. Accordingly, it appears that the Fund held in Finabank's name at CBI exceeds the total amount of all of

the claims asserted against it by local creditors of Finabank. In the event that the present motion to dismiss this proceeding under the Bankruptcy Act is granted, the interpleader action will provide a forum for the orderly disposition of the funds held by CBI in accordance with applicable law.

(4) The Present Proceeding in Chapter XI of the Bankruptcy Act

12. On May 5, 1975, almost four months after the Chase and Boston Bank attachments had been levied, Finabank filed its voluntary Petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act. A copy of the Petition is annexed as Exhibit C for the convenience of the Court.

13. The Petition commences by asserting that Finabank is a Swiss corporation "engaged in the business of banking," and again "engaged in the banking business." The Petition proceeds to allege that Finabank has not had its principal business or principal assets in the United States during the past six months, but has assets in this district; that a petition for a "'sursis bancaire' (Postponement of Maturity)" which "contemplates the rehabilitation of petitioner" was filed with a Swiss court on January 10, 1975, and apparently is still pending; and that the Swiss court on January 20, 1975 appointed FIDES Societe Fiduciaire, a Swiss corporation, as "Commissaire Provisoire" and that it has the authority to file the Petition. The Petition then refers to two exhibits purporting to be a list of creditors and a statement of petitioner's assets and the locations thereof. All of the listed creditors appeared to be foreign

corporations with the exception of Boston Bank, Chase Manhattan Bank, Continental Illinois National Bank and Trust Company, and "Chemical Bank, London, England." Significantly, the list of creditors includes "Demand Deposits" and "Time Deposits" without naming a single depositor under either category.

14. The Petition concludes with an allegation that petitioner is "entitled as a debtor to the benefits of the Bankruptcy Act" and a prayer "that proceedings be had upon this Petition in accordance with the provisions of Chapter XI of the Bankruptcy Act."

15. The first meeting of creditors has been scheduled for July 8, 1975.

REASONS FOR DISMISSAL

A

THE PETITION IS JURISDICTIONALLY DEFECTIVE ON ITS FACE

16. The Petition appears to have been carefully drawn so as to omit making the allegations essential to the jurisdiction of this Court under Chapter XI of the Bankruptcy Act as clearly and unqualifiedly set forth in Section 323, Rules 11-6 and 11-11(b) and Form 11-F1. Specifically, the Petition fails:

(a) to state that the petitioner is insolvent or unable to pay its debts as they mature;

(b) to set forth the provisions of the arrangement proposed by petitioner, or, that petitioner intends to propose an arrangement pursuant to the provisions of Chapter XI;

(c) to have attached to it as Exhibit A, in accordance with the requirements of Official Form 11-F1 a statement setting forth information

with respect to assets, liabilities, secured debt, shares of stock and major stockholders of the petitioner. This Exhibit is required so that the SEC may have the information for its use in the early stages of a Chapter XI case; and

(d) to set forth a list of all debtors, creditors and their addresses, the requirement of Rule 11-11(b). As already noted, the Petition includes in the statement of creditors "Demand Deposits" and "Time Deposits" without listing the name or address of a single depositor. The significance of this omission becomes clear in light of a May 14, 1975 letter and affidavit from Finabank's counsel to Judges Bonsal, Weinfeld, Werker and Babitt (a copy of which is annexed as Exhibit D). In that letter and affidavit, Finabank claims that approximately $11,000,000 of the over $12,000,000 of assets in its name attached at CBI are the property of Finabank's "customers," but none of the customers' names or addresses are set forth.

17. Omission of these essential and jurisdictional allegations by able counsel representing Finabank here could not, of course, have been inadvertent. Whether these essential allegations were omitted because they could not be truthfully made, or if made would have violated the notoriously secret banking laws and practices of Switzerland, we need not speculate. The omissions deprive this Court of jurisdiction, and indeed the Petition should never have been accepted by the clerk for filing.

Moreover, on information and belief, the Petition purports to be verified and filed on behalf of Finabank by a Swiss corporation, acting as Finabank's "Commissaire Provisoire," which did not have authority to do so.

B

PETITIONER IS A "BANKING CORPORATION" WITHIN THE MEANING OF SECTION 4(a) OF THE BANKRUPTCY ACT

18. As noted above, Finabank flatly avers in its Petition that it is a banking corporation. Section 4(a) of the Bankruptcy Act made applicable to Chapter XI proceedings by Section 306(3) provides:

> "Section 4. Who May Become Bankrupts
>
> "(a) Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this Act as a voluntary bankrupt."

We are aware, of course, that the question of whether the exclusion of banking corporations from involuntary bankruptcy under Section 4(b) applies only to domestic banking corporations, and not to foreign, has been extensively briefed to this Court in The Matter of Bankhaus I.D. Herstatt. However, the present proceeding is in a number of respects quite different from Herstatt as will be demonstrated in the memorandum of law to be filed in support of the present motion.

C

ALTERNATIVELY, THE PETITION SHOULD BE DISMISSED PURSUANT TO BANKRUPTCY RULE 119 AND IN THE EXERCISE OF DISCRETION

19. In the event that the Court decides that it has jurisdiction, it is submitted that it should nonetheless

dismiss the Petition pursuant to Rule 119 of the Rules of Bankruptcy Procedure which is made applicable to Chapter XI by Rule 11-17 and in the exercise of discretion.

Rule 119 provides as follows:

"BANKRUPT INVOLVED IN FOREIGN PROCEEDING

> "When a proceeding for the purpose of the liquidation or rehabilitation of his estate has been commenced by or against a bankrupt in a court of competent jurisdiction without the United States, the court of bankruptcy may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspend the proceedings therein under such terms as may be appropriate."

Paragraph 2 of the Petition alleges that a proceeding has been commenced in the Swiss courts which "contemplates the rehabilitation of petitioner."

20. As we will demonstrate in the memorandum and in supplementary affidavits to be filed in support of this motion, the exercise of this Court's discretion to deny the benefits of a voluntary proceeding under Chapter XI to this Swiss banking corporation is particularly appropriate and compelling. As will be more fully developed, Finabank, under Swiss banking practices, will almost certainly be unable or unwilling to disclose the names of all of its creditors and other facts which are regarded in Switzerland as subject to the "Banking Secret"; the local American creditors are few in number and their claims can be fully disposed of in an orderly and lawful manner in the interpleader action; and Finabank is deeply

entangled in the complex affairs of the Mid-European banking community in a manner such that it would simply not be feasible for this Court to effect a plan of arrangement. In the event that the Court does not dismiss the Petition out-of-hand but reaches this question of whether in the exercise of discretion, the Petition should be dismissed, Boston Bank will seek leave to obtain discovery with respect to this branch of its motion.

21. No prior application has been made for the relief sought herein.

WHEREFORE, it is respectfully submitted that the motion should be in all respects granted and that the Petition should be dismissed for lack of subject matter jurisdiction and that Boston Bank should be granted such other and further relief as to the Court may seem just.

/s/ THOMAS A. SHAW, JR.
Thomas A. Shaw, Jr.

Sworn to before me this
26th day of June, 1975.

/s/ Kathleen Roche
Notary Public

KATHLEEN ROCHE
NOTARY PUBLIC, State of New York
No. 24-4525095
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. District Court
Filed
JAN 21 1975
S.D. of N.Y.

- x

THE FIRST NATIONAL BANK OF BOSTON, :

Plaintiff, :

-against- :

BANQUE DE FINANCEMENT S.A., :

Defendant. :

- x

ORDER OF ATTACHMENT

75 Civ. 290. E.W.

An application having been made by plaintiff The First National Bank of Boston, for an order of attachment against the property of defendant Banque de Financement S.A. in an action in the United States District Court for the Southern District of New York,

NOW, upon reading and filing the complaint and affidavit of Ogden White, Jr., sworn to January 20, 1975 and it satisfactorily appearing to the Court from said affidavit that one of the grounds for attachment set out in CPLR 6201 exists in favor of plaintiff and against defendant to recover a sum of money, to wit, the sum of $9,176,375.58 plus interest thereon, for an action for breach of contract, and that plaintiff is entitled to recover said sum plus interest thereon above all counterclaims known to it and that the defendant herein is a foreign company and is not a resident or domiciliary of the State of New York, and the undertaking required by law having been submitted herewith;

NOW on motion of Breed, Abbott & Morgan, attorneys for plaintiff, it is

ORDERED, that plaintiff's undertaking be and the same hereby is fixed in the sum of One Hundred and five Thousand $105,000, of which amount the sum of $100,000 thereof is conditioned that plaintiff will pay to defendant all legal costs and damages which may be sustained by reason of the attachment if defendant recovers judgment or if it is finally decided that plaintiff is not entitled to an attachment of the property of defendant, and the balance thereof, to wit, $5,000. is conditioned that plaintiff will pay to the United States Marshal of the Southern District of New York all of his allowable fees, and it is

FUPTHER ORDERED, that the application for an order of attachment be, and the same hereby is, granted, and it is

FURTHER ORDERED, that the United States Marshal of the Southern District of New York levy within his jurisdiction, at any time before final judgment, upon such property in which defendant has an interest and upon such debts owing to the defendant as will satisfy plaintiff's demand of $9,176,375.58 plus interest thereon, together with probable interest, costs and disbursements and the said Marshal's fees and expenses, and that he proceed hereon in the manner required by law.

Dated: New York, New York
January 20, 1975

Edward Weinfeld
U.S.D.J.

It is further ordered that the plaintiff within three days after levy is made, shall make a motion on notice to defendant, garnishee and the U.S. Marshal for leave to prove the grounds upon which the order of attachment was issued, the burden of proof as to such issue being on the plaintiff. If no such motion is made the order of attachment shall be deemed vacated. No disposition of the levied property shall be made by the U.S. Marshal until final determination of the motion.

J. M. COLE
JOSEPH F. BURCHARDT, Clerk

By _____
Deputy Clerk

Edward Weinfeld
U.S.D.J.

A 29

CBI vs Funds

Pollack,

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CONTINENTAL BANK INTERNATIONAL,

Plaintiff,

-against-

BANQUE DE FINANCEMENT, S.A., THE CHASE MANHATTAN BANK, N.A., MORGAN GUARANTY TRUST COMPANY OF NEW YORK, CREDIT SUISSE, SWISS BANK CORPORATION, A/K/A SOCIETE DE BANQUE SUISSE, H. ALBERT DE BARY & CO., N.V., KIDDER, PEABODY & CO., INC., FIRST NATIONAL CITY BANK, PRIVAT KREDIT BANK, AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION, BANCA PRIVATA IN LUGANO, S.A., BANCA SOLARI & BLUM, S.A., BANK MEES & HOPE, N.V., BANQUE POPULAIRE SUISSE A/K/A BANQUE POPULAIRE SVIZZERA, UNION DE BANQUES SUISSE A/K/A UNION BANK OF SWITZERLAND, BANQUE DE LA SUISSE ITALIENNE A/K/A BANCA DELLA SVIZZERA ITALIANA, BANCA COMMERCIALE DE LUGANO, FINTER BANK ZURICH, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, SHERIFF OF THE CITY OF NEW YORK, and "JOHN DOE" and "RICHARD ROE", unknown claimants to the Fund which is the subject of this action in interpleader,

Defendants.

---

75 Civ. 217

M.P.

ORDER

Upon application of plaintiff, Continental Bank International ("CBI"), supported by the complaint herein and the affidavit of Thomas R. Fessler, sworn to January 20, 1975, it is hereby

ORDERED, as follows:

(1) a summons shall be issued by the Clerk of this Court to each known defendant herein requiring it to appear and defend this action within thirty (30) days after service of the summons upon said defendant, except that the summons issued to the United States Marshal for the Southern District of New York shall require him to appear and defend this action within sixty (60) days after service of the summons upon him;

(2) service of summonses with copies of the complaint and this order upon defendants located outside the United States, including without limitation the defendants listed below, shall be made in accordance with the local law of the countries in which such defendants may be found, or by other service as provided by Rule 4 of the Federal Rules of Civil Procedure or by this order, including without limitation by mailing of such papers to each such defendant by registered or certified mail, return receipt requested, to the addresses listed below, such mailing to be addressed and dispatched by the Clerk of this Court:

Banque de Financement, S.A. ("Finabank")
2 Rue de la Bourse, Geneva, Switzerland

H. Albert de Bary & Co., N.V.
Herengracht 448-454, Amsterdam, the Netherlands

Privat Kredit Bank
Todistrasse 47, CH-8002, Zurich, Switzerland

Banca Privata in Lugano, S.A.
Lugano, Switzerland

Banca Solari & Blum, S.A.
Via Vegezzi 1, 6901 Lugano, Switzerland

Bank Mees and Hope N.V.
548 Herengracht, Amsterdam, the
Netherlands

Banque Populaire Suisse A/K/A Banque
Populaire Svizzera
Berne, Switzerland

Banque de la Suisse Italienne A/K/A
Banca Della Svizzera Italiana
Via Magatti 2, Lugano, Switzerland

Banca Commerciale de Lugano
Lugano, Switzerland

Finter Bank Zurich
Claridenstrasse 35, CH-8022,
Zurich, Switzerland

(3) plaintiff is hereby authorized and directed to deposit the cash presently in the Fund with itself, effective January 21, 1975, in a six (6) month time deposit and thereafter in automatically-renewable time deposits for successive periods of 90 days, with interest on each time deposit at the rate of interest quoted by Manufacturers Hanover Trust Company, 350 Park Avenue, New York, New York on the last business day prior to the commencement date of the period, or of the renewal of the time deposit;

(4) plaintiff is hereby authorized and directed to present for redemption and payment on the date of maturity thereof each certificate of deposit included within the Fund, holding the proceeds as part of the Fund, and depositing such proceeds with itself in automatically-renewable time deposits upon terms similar to those set out in subparagraph (3) of this ordering paragraph;

(5) plaintiff's attorneys, Kelley Drye & Warren, 350 Park Avenue, New York, N.Y. 10022, are hereby designated and authorized on behalf of this Court to seek the assistance of any foreign court or governmental agency or other appropriate person in obtaining service on the defendants herein;

(6) service shall be made upon "John Doe" and "Richard Roe", unknown defendants, by publishing a copy of this order in American Banker once a week for six consecutive weeks beginning January 24th, 1975;

(7) the Clerk of this Court is hereby authorized and directed to accept the bond of CBI in the amount of $12,222,122.54, conditioned upon compliance by CBI with the future order or judgment of this Court with respect to disposition of the Fund which is the subject matter of this interpleader action;

(8) all defendants herein are hereby restrained from instituting or prosecuting any proceeding in any State or United States court against CBI affecting the Fund involved in this interpleader action; and

(9) all defendants herein are hereby restrained from prosecuting any proceeding to compel payment or delivery of any sums from the Fund other than in this interpleader action.

Dated: New York, New York
January 21, 1975

Milton Pollack
United States District Judge

A 33

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - x

In re	In Proceeding for
BANQUE DE FINANCEMENT, S.A. :	An Arrangement
Debtor :	No.
:	PETITION

- - - - - - - - - - - - - - - - - x

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

A petition of the Banque de Financement S.A. ("FINABANK"), a corporation of the Canton of Geneva, Confederation of Switzerland, engaged in the business of banking, respectfully represents:

1. Petitioner is a corporation organized under the laws of the Confederation of Switzerland and engaged in the banking business, with its post office address at 2, Rue de la Bourse, Geneva, Switzerland. Petitioner has not had its principal place of business or its principal assets in this district or any other district in the United States of America for the preceding six months or for a longer portion thereof. Petitioner has property and other assets in this district and by reason thereof this Court has jurisdiction, pursuant to the provisions of Section 2a (1) of the Bankruptcy Act and Rule 116 (a) (2) (b) of the Rules of Bankruptcy Procedure, effective October 1, 1973, which are applicable to Chapter XI proceedings pursuant to Sections 302 and 312 of the

Bankruptcy Act and Rule XI-1 of the Bankruptcy Rules of the Southern District of New York.

2. On January 10, 1975, pursuant to the laws of Switzerland, pursuant to the direction of the Swiss Banking Commission petitioner filed a petition for a "sursis bancaire" (Postponement of Maturity) with the Premiere Section of the Court of Justice of the Canton of Geneva, Confederation of Switzerland. The petition contemplates the rehabilitation of petitioner, but has imposed a moratorium on petitioner's conduct of its business pending, among other things, a determination of petitioner's capability for rehabilitation.

3. On January 20, 1975, a mandate was made by the Court of Justice, Canton of Geneva, Confederation of Switzerland, constituting FIDES Societe Fiduciaire, a corporation organized under the laws of Switzerland with its place of business at Avenue de Champel 8c, 1206 Geneva, Switzerland as Commissaire Provisoire, or Temporary Commissioner, of Finabank. Pursuant thereto, FIDES Societe Fiduciaire has full authority to act on behalf of petitioner in the filing of this petition and in all matters related thereto.

4. Annexed hereto as Exhibit A, and expressly made a part hereof, verified by your petitioner's oath, is a list of creditors and, of such creditors so far as it is possible to ascertain, their places of residence. Further schedules and the statement of affairs will be filed as required by the Bankruptcy Act.

5. Annexed hereto as Exhibit B, and expressly made a part hereof, is a statement of petitioner's assets and the locations thereof. Detailed inventories of all property, personal and real, and such further statements concerning its property, as required by the Bankruptcy Act, and a full and true statement of all executory contracts will be filed within the time period prescribed by the provisions of the Bankruptcy Act.

6. Petitioner is qualified to file this petition and is entitled, as a debtor, to the benefits of the Bankruptcy Act.

WHEREFORE, petitioner prays that proceedings be had upon this petition in accordance with the provisions of Chapter XI of the Bankruptcy Act.

Dated: New York, New York
May 5, 1975

MUDGE ROSE GUTHRIE & ALEXANDER

By /s/ John C. Kelley Jr.
A Member of the Firm

Attorneys for Debtor
20 Broad Street
New York, New York 10005
Tel.: (212) 422-6767

A 36

VERIFICATION

CANTON OF GENEVA)
CONFEDERATION OF SWITZERLAND) ss.:

Frédéric HASLER and Willy BECKER, being duly sworn, jointly depose and say:

1. We are Manager (first-named) and Assistant Manager (second-named) of FIDES Société Fiduciaire, the Commissaire Provisoire of Finabank, the petitioner in the foregoing petition.

2. We do hereby swear that the statements contained therein, and in the annexed exhibits, are true to the best of our knowledge, information, and belief and that the filing of this petition on behalf of the debtor has been authorized.

Frédéric HASLER
Manager

Willy BECKER
Assistant Manager

Sworn to before me by Mr Frédéric HASLER and Mr Willy BECKER this 2nd day of May, 1975

OFFICE CANTONAL DES POURSUITES ET FAILLITES GENEVE

1975

EXHIBIT A

LIST OF CREDITORS

Due to Banks-Sight

Privat Kredit Bank, Zurich, Switzerland
Banca Solari & Blum S.A. Lugano, Switzerland
Continental Illinois National Bank & Trust Company of Chicago, Chicago, USA
Continental Illinois National Bank & Trust Company of Chicago, Geneva, Switzerland
Istituto per le Opere di Religione, Città del Vaticano
Bankhaus Wolff K.G., Hamburg, Germany
Skandinaviska Enskilda Banken, Stockholm, Sweden
Banca Privata Italiana, i.l. Milan, Italy
Generale Immobiliare Banking Corporation (Cayman) Ltd Grand Cayman, Cayman Islands
Chemical Bank, London, England

Due to Banks (Failure by Finabank to perform under forward foreign exchange contracts)

Firestone Bank, Zurich, Switzerland
Union de Banques Suisses, Chiasso, Switzerland
Crédit Lyonnais, Geneva, Switzerland
Deutsche Genossenschaftskasse Frankfurt, Germany
Hessische Landesbank Girozentrale, Frankfurt, Germany
Investitions und Handelsbank, Frankfurt, Germany
Ost-West Handelsbank, Frankfurt, Germany
Banque Belge pour l'Industrie, Brussels, Belgium
First National Bank of Boston, Paris, France
Banca di Credito di Milano, Milan, Italy
Banca Popolare di Milano, Milan, Italy
Banca Privata Italiana i.l., Milan, Italy
Chase Manhattan Bank, Milan, Italy
Crédit Lyonnais, Luxembourg, Luxembourg

Due to Banks-Time

Banque Procrédit, Zurich, Switzerland
Istituto per le Opere di Religione, Città del Vaticano
Generale Immobiliare Banking Corporation (Cayman) Ltd Grand Cayman (Cayman Islands)

Demand Deposits

Time Deposits

Acceptances and Similar Engagements in favor of Midland Bank Ltd, London

Sundry Liabilities

Taxes due
Legal fees and Invoices due

EXHIBIT B

SCHEDULE OF ASSETS

Cash on hand and due from Swiss National Bank and Postal Checking Account

Due from Banks-Sight

Banque Populaire Suisse, Geneva, Switzerland
Crédit Suisse, Geneva, Switzerland
Société de Banque Suisse, Basle, Switzerland
Société de Banque Suisse, Geneva, Switzerland
Société de Banque Suisse, Lausanne, Switzerland
Société de Banque Suisse, Zurich, Switzerland
Union de Banques Suisses, Chiasso, Switzerland
Union de Banques Suisses, Geneva, Switzerland
Union de Banques Suisses, Lausanne, Switzerland
Union de Banques Suisses, Zurich, Switzerland
Bankhaus I.D. Herstatt, Cologne, Germany
Bankhaus Wolff K.G., Hamburg, Germany
Albert H. de Bary, Amsterdam, Netherland
Banca Privata Italiana, Milan and Rome, Italy
Banca Commerciale Italiana, Milan, Italy
Banca Nazionale del Lavoro, Milan, Italy
Credito Lombardo, Milan, Italy
Istituto Bancario San Paulo di Torino, Milan, Italy
Banco Tornquist, Buenos Aires, Argentina
Bankers Trust Co., New York, USA
The Chase Manhattan Bank, New York, USA
Chemical Bank, New York, USA
Continental Bank International, New York, USA
Continental Illinois National Bank & Trust Company of Chicago, Chicago, USA
First National City Bank, New York
Irving Trust Company, New York, USA
Manufacturers Hanover Trust Co., New York, USA
Morgan Guaranty Trust Co., New York, USA
Generale Immobiliare Banking Corporation (Cayman) Ltd Grand Cayman, Cayman Islands

Due from Banks-Time

Crédit Suisse, Geneva, Switzerland
Swiss National Bank, Geneva, Switzerland

Loans, Overdrafts and Advances to Customers

Bills discounted
Overdrafts in current accounts
Term Loans

Mortgages

On one property in Geneva, Switzerland

EXHIBIT I (continued)

Investments and Securities on Deposit with following Correspondents:

in our own safe
Compagnie de Banque et d'Investissements, Geneva, Switzerland
Banca del Gottardo, Lugano, Switzerland
Swiss Credit Bank, Geneva, Switzerland
Swiss Bank Corporation, Basle, Switzerland
Banca Morgan Vonwiller, Milan, Italy
Vontobel & Co, Zurich, Switzerland
Clariden Bank, Zurich, Switzerland
Hentsch & Co., Geneva, Switzerland
Chemical Fund c/o Bradford Trust Co, New York, USA
Fidelity Fund c/Service Corp., Boston, USA
Fidelity Trend Fund c/o FMR Service Corp., Boston, USA
Supervised Investors Growth Fund c/o Data Sys Tance Inc., Kansas City/USA
Technology Fund c/o Data Sys Tance Inc., Kansas City, USA

Permanent Participations

Securities deposited with Banco del Gottardo, Lugano, Switzerland and Banca Morgan Vonwiller, Milan, Italy
Generale Immobiliare Banking Corporation (Cayman) Ltd, Grand Cayman, Cayman Islands
Bankhaus Wolff K.G., Hamburg, Germany

Bank Premises

Building at 2, Rue de la Bourse, Geneva, Switzerland

Due from Customer (unfulfilled forward exchange contracts)

A 40 . [illegible]

MMes GAMPERT ET TOURNIER
NOTAIRES
19, RUE GÉNÉRAL-DUFOUR
GENÈVE

Filed in court 5/5/75

☐ DIARIED

☒ DOCKETED

MMes GAMPERT ET TOURNIER
NOTAIRES
19, RUE GÉNÉRAL-DUFOUR
GENÈVE

MUDGE ROSE GUTHRIE & ALEXANDER

20 BROAD STREET

NEW YORK, N.Y. 10005

212-422-6767

May 14, 1975

BY HAND

Hon. Dudley B. Bonsal, U.S.D.J.
Hon. Edward Weinfeld, U.S.D.J.
Hon. Henry F. Werker, U.S.D.J.
Hon. Roy Babitt, Bankruptcy Judge

Re: Continental Bank International v. Banque de Financement, S.A., et al., 75 Civ. 299 (D.B.B.)

The First National Bank of Boston v. Banque de Financement, S.A., 75 Civ. 290 (E.W.)

The Chase Manhattan Bank N.A. v. Banque de Financement, S.A., 75 Civ. 39 (H.F.W.)

In re Banque de Financement, S.A., 75 B 764

Dear Sirs:

We are attorneys for the Banque de Financement, S.A., in the preceding actions, all pending in the United States District Court for the Southern District of New York.

Among other things, in issue in each of these proceedings is the ownership of approximately $13 million held in the name of the Banque de Financement, S.A. by Continental Bank International. It is the Banque's

BEST COPY AVAILABLE

position that the bulk of those funds belong not to the Banque, but to its customers.

We recently received from our client an affidavit prepared by its regular outside auditors. That affidavit is further confirmation of the fact that the funds referred to are not those of the Banque.

Because of the complex interrelationship of the pending actions in this Court, a further motion or other application to the Court does not now appear to be appropriate. However, the affidavit concerns important facts which we believe ought to be brought to the attention of the parties involved in those cases.

We are mailing a copy of this letter and the auditor's affidavit to the counsel of record listed below. The original affidavit has been sent to Judge Weinfeld with this letter, so that it may be placed on public record.

Very truly yours,

Shadyac Moo Guthrie & Agnello

cc: Milbank, Tweed, Hadley & McCloy, Esqs.
Breed, Abbott & Morgan, Esqs.
Baker & McKenzie, Esqs.
Proskauer Rose Goetz & Mendelsohn, Esqs.
Sherman & Sterling, Esqs
Spengler Carlson Guber & Churchill, Esqs.
Sullivan & Cromwell, Esqs.
White & Case, Esqs.
Wickes, Ridell, Bloomer, Jacobi & McGuire, Esqs.
Kelley, Drye & Warren, Esqs.
Zimet, Haines, Moss & Goodkind, Esqs.

COPY RECEIVED BY
MAY 16 1975
BREED, ABBOTT & MORGAN
ATTY'S FOR:

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE FIRST NATIONAL BANK OF BOSTON :

Plaintiff, :

-against- : 75 Civ. 290 (E. J.)

BANQUE DE FINANCEMENT S.A. "FINABANK" :

Defendant. :

AFFIDAVIT

EMBASSY OF THE)
UNITED STATES OF AMERICA) : SS. :
CONFEDERATION OF SWITZERLAND)
CANTON OF BERNE)

JACQUES GIRARDIN, being duly sworn, deposes and says :

1. I am an authorized representative of the Société Fiduciaire Romande OFOR S.A., of Geneva, Switzerland, auditing firm officially authorized by the Swiss banking Commission to act as bank auditors and the auditors as described in paragraphs 727 et seq. of the Swiss Code of Obligations and in the Swiss federal banking law, of Banque de Financement S.A. "FINABANK" (hereinafter Finabank) the Defendant. I am a qualified bank auditor approved by the Swiss Banking Commission.

2. I have examined the affidavit dated February 7, 1975 of Willy Becker, the Assistant Manager of FIDES Société Fiduciaire, the "Commissaire provisoire" (temporary commissioner) of Finabank.

3. I hereby state that funds described hereinafter, which are held in trust by Finabank, are the property of its customers. This statement is based on my having verified the postings in the customers' accounts of the purchase of the certificates of deposit and on my having

...

examined the activity in the accounts of the customers concerned since the dates on which the customers purchased such certificates of deposit until January 7, 1975. In addition, and on the basis of Finabank's records, I have ascertained the identity of the titular holders of the accounts.

These funds are :

a) certificates of deposit of Continental Illinois National Bank and Trust Co of Chicago (CINB) deposited with Continental Bank International, New York (CBI), listed in Exhibit A hereto and totaling $ 8.732.000.--;

b) certificates of deposit with maturities of up to January 21, 1975 inclusive, the proceeds of which totaling $ 2.245.310.-- were credited by CBI to an account labeled "Special account No 1" in the name of Finabank established by CBI on its books on January 8, 1975.

4. The Special account No 2 in the name of Finabank, opened by CBI on its books on January 9, 1975, recorded until January 31, 1975 the yield and/or the reimbursement of clients' deposits. Funds enumerated hereafter are deposited in the name of Finabank but for the account and risk of its clients in accordance with the terms of the duly signed trustee contracts which have been exhibited to me :

- $ 139.000,00 being a partial payment of interest due on January 10, 1975 on a loan made to Helliniki Techniki S.A., Athens;
- $ 943,75 being interest due on December 31, 1974 on a deposit with Williams & Glyn's Bank Ltd., London;
- $ 138.803,89 being the reimbursement of the principal of and interest on a deposit with First National City Bank, London as of January 16, 1975;
- $ 99.594,23 being the partial reimbursement of the principal of and interest on a deposit of $ 100.000.-- with Bank of America NT & SA, London, as of January 24, 1975.

6. With reference to paragraph 32 of Plaintiff's Interpleader Complaint (Continental Bank International, Plaintiff against Banque de Financement S.A. et al., Defendants), I hereby state that Finabank's instructions of January 7, 1975 to CBI to transfer to H. Albert de Bary & Co N.V., Amsterdam, the amounts of $ 209.000, $ 60.000 and $ 36.000 relate to the creation of deposits in the name of Finabank but for the account and risk of clients, in accordance with duly signed trustee contracts which have been exhibited to me. These transactions were initiated on January 3 and 6, 1975 for value January 7, 1975 and are confirmed on these dates by the correspondent.

7. My examination was limited to transactions relative to certificates of deposit and to deposits effected in the name of Finabank but for account and risk of clients, all other funds held in trust by Finabank not being included in the figures given hereinabove and in Exhibit A hereto.

...

8. In accordance with the accounting principles applicable in Switzerland, this means that the funds described hereinabove and in Exhibit A hereto are funds of Finabank's clients, not funds of Finabank.

Jacques GIRARDIN

Confederation of Switzerland
Canton of Bern
Embassy of the United States of America } ss.

Sworn before me this
5th day of May , 1975

RICHARD L. HUGHES
Consul of the United States of America

CERTIFICATES OF DEPOSIT

No.	principal	rate	maturity
[illegible]	$ 103.000,00	9-1/4	1-22-75
[illegible]	130.000,00	9-1/4	1-27-75
[illegible]	108.000,00	9-1/4	1-27-75
[illegible]	270.000,00	9-3/8	1-27-75
[illegible]	159.000,00	9	1-28-75
[illegible]	123.000,00	9-3/8	1-29-75
[illegible]	102.000,00	9-3/8	1-29-75
[illegible]	100.000,00	9-3/8	1-29-75
[illegible]	155.000,00	9-3/8	1-29-75
[illegible]	114.000,00	9-3/8	1-29-75
[illegible]	124.000,00	9-3/8	1-29-75
[illegible]	132.000,00	9-1/4	1-30-75
[illegible]	103.000,00	9-1/4	1-30-75
[illegible]	130.000,00	8-7/8	2- 3-75
[illegible]	104.000,00	8-7/8	2- 3-75
[illegible]	103.000,00	8-7/8	2- 3-75
[illegible]	102.000,00	8-7/8	2- 3-75
[illegible]	102.000,00	8-7/8	2- 3-75
[illegible]	102.000,00	8-7/8	2- 3-75
[illegible]	249.000,00	9-1/4	2- 3-75
[illegible]	197.000,00	9	2- 4-75
[illegible]	105.000,00	8-1/4	2- 6-75
[illegible]	126.000,00	8-7/8	2-10-75
[illegible]	139.000,00	8-7/8	2-11-75
[illegible]	110.000,00	8-7/8	2-11-75
[illegible]	145.000,00	8-5/8	2-13-75
[illegible]	142.000,00	8-5/8	2-13-75
[illegible]	1.000.000,00	12	2-18-75
[illegible]	183.000,00	8-5/8	2-18-75
[illegible]	146.000,00	8-5/8	2-18-75
[illegible]	104.000,00	8-5/8	2-19-75
[illegible]	108.000,00	9.4	2-25-75
[illegible]	307.000,00	9.4	2-25-75
[illegible]	252.000,00	9.4	2-25-75
[illegible]	231.000,00	9.4	2-25-75
[illegible]	103.000,00	9	3- 3-75
[illegible]	140.000,00	9-1/8	3- 4-75
[illegible]	103.000,00	9-1/8	3- 4-75
[illegible]	132.000,00	9-1/8	3- 4-75
[illegible]	109.000,00	9-1/8	3- 4-75
[illegible]	190.000,00	10-1/2	3- 5-75
[illegible]	144.000,00	8-3/4	3-10-75
[illegible]	156.000,00	8-3/4	3-12-75
[illegible]	112.000,00	8-7/8	3-17-75

Exhibit A

[illegible]	141.000,00	8-7/8	3-18-75
[illegible]	130.000,00	8-7/8	3-24-75
[illegible]	127.000,00	8-7/8	3-26-75
[illegible]	100.000,00	8-7/8	3-26-75
[illegible]	107.000,00	8-7/8	3-26-75
[illegible]	104.000,00	8-7/8	3-26-75
[illegible]	250.000,00	9	3-27-75
[illegible]	148.000,00	9	3-31-75
[illegible]	100.000,00	8-7/8	3-31-75
[illegible]	121.000,00	8-7/8	4- 2-75
	$ 8.732.000,00		

d
ors.
ns

k

A 48 AFFIDAVIT OF MATHIAS MAYOR DATED JULY 17, 1975

United States District Court
Southern District of New York

in re	:	in proceedings for an
Banque de Financement, S.A.,	:	arrangement no. 75 b. 764
debtor	:	(rb)

Canton of Geneva) Confederation of Switzerland	ss:	AFFIDAVIT IN SUPPORT OF MOTION

Mathias Mayor, being duly sworn, deposes and says :

1. I am an attorney duly admitted for twenty years to the bar of Geneva, Switzerland, and am a member of Sandoz, Mayor, Moreillon and Reymond, a firm of attorneys practising in Geneva, Switzerland at 11 Rue d'Italie. I make this affidavit at the request of the First National Bank of Boston, which I am representing as an attorney in Switzerland.

2. I have ascertained the following facts concerning the debtor, Banque de Financement, S.A. (hereinafter Finabank) :

(a) On January 7, 1975, Finabank closed its windows. This decision had been triggered by a recommendation made to Finabank by the Federal Banking Commission (a government agency supervising the activity of banks in Switzerland, in accordance with the swiss federal banking law of November 8, 1934) to file its balance sheet with the appropriate court.

(b) In fact, Finabank filed on January 10 a petition for a banking moratorium with the Geneva Court of Justice. Pending the decision on the petition for a banking moratorium, the Geneva Court on January 20, 1975, appointed Fides Société Fiduciaire (hereinafter "Fides") a Swiss corporation of certified public accountants as commissaire provisoire, i.e. provisional commissioner.

./..

(c) Finabank's petition for a banking moratorium was never granted. By document dated June 19 and filed June 23, 1975, Finabank withdrew its petition for a banking moratorium and petitioned for a normal moratorium. Bankruptcy proceedings have not been opened for Finabank in Switzerland, nor has it yet petitioned for a composition with creditors in accordance with Swiss law.

3. I have read the petition of Finabank in the above captioned proceeding dated May 5, 1975, a copy of which is annexed hereto as Exhibit A, and have noted the reference in paragraph 3 to the January 20, 1975, mandate of the Geneva Court of Justice constituting Fides as commissaire provisoire and the statement :

"Pursuant thereto (the said mandate), Fides Société Fiduciaire has full authority to act on behalf of petitioner in the filing of this petition and in all matters related thereto."

Though it is unclear whether Finabank or Fides is the petitioning party in the above captioned proceeding, article 35 of the Swiss banking law indicates that an order of the court in the banking moratorium proceeding would be required before Fides would be authorized to file a proceeding under any foreign bankruptcy law. No such court order has been sought or obtained in the Geneva court proceedings.

"Article 35 of Swiss Banking Law reads as follows :

.....

2. Where it becomes evident during the moratorium that the assets of the bank no longer cover its liabilities or that it will not be able to meet its liabilities in time after the expiration of the moratorium or that it will not be able to achieve an out-of-court reorganization, the court instructs the commissioner to require from the appropriate court the immediate opening of the bankruptcy proceedings, unless the bank petitions for an arrangement with creditors.... "

4. I have further noted that the petition annexes a list of bank creditors. (Exhibit A annexed hereto) which includes demand, deposits and time deposits but fails to give a comprehensive list of all its depositors.

Swiss law provides in paragraph 2 of article 273 of the criminal code :

"Whoever renders a business secret to an official or private foreign body or to a private foreign firm or their agents ....." (is liable to criminal sanctions)

and in article 47 of the federal banking law :

"1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as a representative of the banking commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term

not to exceed six months or by a fine not exceeding 50,000 francs."

There is a limited exception only to article 47 of the Federal Banking Law which permits furnishing to creditors, but only to creditors, a list of other creditors upon the filing of a plan for a composition or a bankruptcy (liquidation), neither of which had occurred on May 5 at the time of filing of the above captioned proceeding or has occurred to date. (Article 10 and 30 of federal court ordinance of April 11, 1935).

These provisions effectively prohibit either Finabank or Fides from furnishing to a foreign court, or from directly or indirectly making public, the names and addresses of its depositors or creditors or divulging information concerning their dealings with Finabank, even after the filing of a plan for composition with creditors or a bankruptcy.

5. Under Swiss law attachments of a debtor's property or assets are valid and are not voided in a proceeding for a moratorium and composition with creditors. Attachments are voided only in bankruptcy (liquidation) proceedings (article 199 bankruptcy law). No bankruptcy proceedings have been commenced in Switzerland .

6. In reverse circumstances an American bank having assets but no place of business in Switzerland could not obtain a moratorium nor be adjudged a bankrupt in Switzerland even if its assets in Switzerland were attached since article 52 of the Swiss Bankruptcy Law provides that :

> "The suit for collection after attachment takes place where the attached assets are, however the bankruptcy can be commenced only where the debtor has its ordinary place of business".

Dated July 17, 1975

Mathias Mayor

Suscribed and sworn to before me Pierre CHRISTEN, Notary Public in Geneva, by Mr. Mathias MAYOR this 17th day of July 1975.

17 JUL

CHRISTEN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In re	In Proceeding for An Arrangement No. 75B.764
BANQUE DE FINANCEMENT, S.A.	
Debtor	AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Richard B. Marrin, being duly sworn, deposes and says:

1. I am associated with the firm of Mudge Rose Guthrie & Alexander, attorneys for the debtor herein. I offer this affidavit in opposition to a motion by First National Bank of Boston ("Boston Bank") for an order dismissing these proceedings.

2. The Boston Bank filed two affidavits in support of its motion, one by its United States counsel, Thomas A. Shaw ["the Shaw Affidavit"), and one by its Swiss counsel, Mathias Mayor ("Mayor Affidavit").

THE SHAW AFFIDAVIT

3. Paragraphs 3 through 15 of the Shaw Affidavit contain factual statements of the Boston Bank's alleged claim against the debtor and a description of other litigation involving the debtor in the Southern District of New York, including the present proceeding. We do not find serious difficulty with the Boston Bank's recitation of the facts, all of which are of public record, but we respectfully refer this Court to the various proceedings referred to, and the papers filed therein, for a true and accurate description of the contents thereof.

4. We do, however, take objection to the remaining paragraphs of the motion and, for the record, deny each and every one of the allegations of paragraphs 16 through 20.

5. Basically, these paragraphs contain legal conclusions which do not require responsive pleading. The arguments, of course, will be fully briefed in the papers to be filed with this Court.

6. In specific, we believe that the petition for a Chapter XI arrangement stated in substance all that is required of it under the Bankruptcy Act. It clearly shows that a moratorium had been ordered in Switzerland and that the debtor could not pay its debts as they fell due. In addition, it sets forth that the debtor hoped to be rehabilitated, either under the law of the United States or of Switzerland, or by a combination thereof. It also gave a list of the creditors. Pursuant to Court order, extensions were obtained for filing the remaining information required by Rule 11-11b, including the debtor's statement of affairs and the schedules. These have since been filed with the Court.

7. It is true that Exhibit A of the official form 11-F1 was not filed with the original petition. This form seeks certain information about assets, liabilities, secured debts, shares of stock and major stockholders of the petitioner, and is for the use of the Securities & Exchange Commission. The debtor is not a company regulated by the SEC. I did, however, at about the time of the filing, speak with a representative of the SEC, who was well aware of the filing. He stated that it was not the type of proceeding in which the SEC was interested. This Court has granted debtor an extension of time until August 15, 1975 to file Exhibit A.

8. The Shaw affidavit also claims that it would be within this Court's discretion to dismiss the proceedings, pursuant to Rule 119 of the Bankruptcy Rules. The affidavit claims that this would be appropriate because the debtor, under Swiss banking practices and law, will "almost certainly be unable or unwilling to disclose the names of all of its creditors and other facts which are required in Switzerland". The affidavit also states that the interpleader action, presently pending in the Southern District, can act as the appropriate forum for the disposal of the funds presently in the United States. As will be more fully set forth in the briefs to be filed with this Court, the Boston Bank is incorrect in its assumptions. First of all, there is no prohibition against a Swiss Bank's revealing the names of other banks with which it maintained and conducted business relationships. Secondly, there is a procedure available which will permit full review of Finabank's records, without any violation of Swiss law. This entails requesting the United States Court to provide for a rogatory commission to the Geneva Court of Justice, which would, with the assistance of any delegate of the United States Court, review all relevant documents of the debtor. In addition, the debtor has notified directly all of its customers of the pendency of the Continental interpleader action and informed them of the proper method by which they could appear and assert their rights in that fund. To the extent it has not been done already, a similar communication, reviewed and approved by this Court in advance, couldbe sent directly to all creditors by the debtor or by a Swiss Court. This would not presumably result in a violation of Swiss law. If the creditors thereafter declined to file proofs of claims, it would be their choice.

9. The foregoing alternatives are illustrative of the fact that this Court in its discretion can effectively apply the mechanics of the United States Bankruptcy Act to the present circumstances. It is anticipated that situations will undoubtedly arise which will tax this Court's and counsel's ingenuity. However, just because this is not the "run of the mill" bankruptcy proceeding, is not a sufficient reason for a dismissal of the petition.

10. The argument that the interpleader court will be the only forum necessary for dividing up the debtor's United States assets is equally misfounded. That proceeding will determine which portion of the fund belongs to the debtor and which portion is the property of third parties. The interpleader court will not decide whether the Boston Bank's attachment should be voided because it was made within four months of the filing of a petition. It will not distribute the debtor's portion of that fund on a pro rata basis (or on whatever form of distribution is eventually effected) to the debtor's creditors. The interpleader action is necessary to collect the assets of the debtor, but it is not the solution of the entire problem. The protection of the debtor's creditor requires the continuation of the proceedings before this Court.

THE MAYOR AFFIDAVIT

11. The Mayor affidavit which was received by our office on about July 22, 1975, sets forth various facts concerning the debtor's "closing its windows" in Geneva and applying for a moratorium. It also sets forth various provisions of and conclusions concerning Swiss law. That affidavit has been sent to Swiss counsel for their review and comment.

12. Paragraph 2 of the Mayor Affidavit recites certain facts which appear to be accurate, with certain exceptions. Those

exceptions are attached as Exhibit A, which recites a portion of a telex received from the debtor, after it reviewed the Mayor Affidavit.

13. Paragraph 3 of the Affidavit questions the authority of Fides Societe Fiduciaire ["Fides"] to file the petition on behalf of the debtor. As will be shown in our briefs to be filed with this Court, Fides, as Provisional Commissioner, had to have authority to file the petition and acted properly in doing so. The petition is clearly the debtor's, not Fides'.

14. Paragraph 4 of the Mayor Affidavit discussed the Swiss law as to bank secrecy. These allegations, which are also included in the Shaw Affidavit, are treated in paragraphs 8 and 9, supra, and need not be repeated here.

15. Finally, paragraphs 5 and 6 of the Mayor Affidavit point out differences between the Swiss Law and the United States Law with respect to the voiding of preferential attachments and the appropriateness of filing a petition in any place other than where the debtor has its ordinary place of business. Obviously, it is the United States Law which controls the proceedings before this Court. It is the United States Bankruptcy Act and the filing of a petition pursuant to it, not the Swiss postponement of maturities, which voids preferential attachments. Similarly, it is the United States Bankruptcy Act and Rules which permit the filing of a petition in any district where the debtor has property. While Swiss Law might be relevant in other aspects of these proceedings, it is not relevant on these two points.

WHEREFORE, it is respectfully submitted that the motion of First National Bank of Boston be in all respects

denied and that the debtor should be granted whatever further and other relief as to the Court may seem just and proper.

Richard B. Marrin

Sworn to before me
this 31st day of July, 1975.

Notary Public

VIRGINIA M. STONE
Notary Public, State of New York
No. 43-9207807
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1976

COPIED FROM TELEX OF 7/31/75

OUR POSITION REGARDING MAYOR AFFIDAVIT IS AS FOLLOWS POINT BY POINT:

1) NO COMMENT

2) A) DENY ALLEGATION EXCEPT THAT ON JANUARY 7, 1975 FINABANK CLOSED ITS WINDOWS BY ORDER OF THE SWISS FEDERAL BANKING COMMISSION WHICH SIMULTANEOUSLY INSTRUCTED FINABANK TO FILE ITS BALANCE-SHEET WITH THE APPROPRIATE COURT.

B) ADMIT, WITH REMARK "BANKING MORATORIUM" SHOULD READ "POSTPONEMENT OF MATURITIES" (SOURCE PUBLISHED TRANSLATION OF SWISS BANKING LAW BY UNION BANK OF SWITZERLAND)

C) ADMIT EXCEPT FOR TERM "BANKING MORATORIUM" SEE REMARK ABOVE.

Exhibit A

A 58 AFFIDAVIT OF JEAN-MARIE NUSBAUMER DATED AUGUST 12, 1975

AFFIDAVIT

Jean-Marie François Nusbaumer, being duly sworn, deposes and says:

1) I am the Principal Manager of Banque de Financement S.A. "Finabank", en sursis concordataire (Finabank). I have been the Principal Manager since January 1, 1971.

2) During the first week of May 1975, I met in Geneva with Mr. John Witmeyer, an associate of the firm Mudge Rose Guthrie & Alexander, New York, which firm was acting as counsel for Finabank in the United States. I reviewed with Mr. Witmeyer a petition by Finabank for a proceeding for an arrangement in the United States District Court for the Southern District of New York. Thereafter, this petition was considered by Professor Charles-André Junod, counsel for Finabank in Geneva and by members of the Board of directors of Finabank. Professor Junod and I communicated to Mudge Rose Guthrie & Alexander the decision of Finabank to file the above-described petition.

3) Since at this time Finabank, which had filed a petition for a postponement of maturity, and, at the direction of the Court of Justice, First Section, Republic & Canton of Geneva, Switzerland was under the supervision of a provisional commissioner, Société Fiduciaire Fides, the petition was also presented to Fides for its review and concurrence in the decision of Finabank. Fides, through its manager, Frédéric Hasler and its assistant-manager, Willy Becker affirmed that the filing of the above-described petition had been authorized.

4) As a consequence of the above, Finabank directed Mudge Rose Guthrie & Alexander to file the petition.

Sworn to before me
on 12 th August 1975
at Geneva, Switzerland

Jean-Marie Nusbaumer

Jean-Claude ANSERMOZ, notary / No 3'696

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re :	
BANQUE DE FINANCEMENT, S. A., :	IN PROCEEDING FOR AN ARRANGEMENT
Debtor. :	75 B 764 (R.B.)

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RICHARD B. MARRIN, being duly sworn, deposes and says:

1. I am associated with the firm of Mudge Rose Guthrie & Alexander, attorneys for debtor herein.

2. Attached hereto, as Exhibits A, B, and C are telexes and transcripts received by our office today. As noted therein, formalized copies of these affidavits are being airmailed to us for filing with the Court. They are being presented in the attached form, however, so they will be available to the Court for oral argument on August 19, 1975.

3. The three affidavits essentially detail my affidavit of July 30, 1975 which was submitted in opposition to the pending motion to dismiss. However, if this Court thinks it reasonable, we have no objection to giving movants a reasonable amount of time to reply to them after oral argument.

Richard B. Marrin

Sworn to before me this
15th day of August, 1975.

Notary Public

A 60

Rec'd 8/15/75 12 P17

DD

Telex
western union

1343 EDT*
MUDGEROSE NYK

22197 FINA CH

TO : MJDGE ROSE GUTHRIE AND ALEXANDER NEW YORK
ATTENTION JOHN J KIRBY AND/OR RICHARD B MARRIN

FROM : BANQUE DE FINANCEMENT SA FINABANK
EN SURSIS CONCORDATAIRE
GENEVA SWITZERLAND

AUGUST 15, 1975
FOLLOWING IS AN AFFIDAVIT EXECUTED BY PROFESSEUR CHARLES-ANDRE JUNOD AND WHICH IS BEING AIRMAILED TO YOU.

IF YOU HAVE AN URGENT QUESTION PLEASE CALL EITHER
JUNOD TEL

E

PHONE GENEVA : OFFICE 21 70 77,
HOME 35 33 60 OR MR PIERRE ENGEL TEL.
OFFICE 35 93 40 HOME 46 57 21

TEXT OF AFFIDAVIT:

QUOTE

AFFIDAVIT

FOR THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
IN RE
BANQUE DE FINANCEMENT S.A.,
DEBTOR

IN PROCEEDINGS FOR
AN ARRANGEMENT
75 B 764 (R.B.)

CHARLES-ANDRE JUNOD, BEING DULY SWORN, DEPOSES AND SAYS:

1. I AM AN ATTORNEY DULY ADMITTED FOR OVER TWENTY YEARS TO THE GENEVA BAR (SWITZERLAND), AND AM A PARTNER OF THE LAW FIRM JUNOD AND GUYET, 10, RUE DE LA CORRATERIE, GENEVA, SWITZERLAND. I AM ALSO A PROFESSOR AT THE FACULTY OF LAW OF THE UNIVERSITY OF GENEVA, WHERE I HAVE BEEN TEACHING, INTER ALIA, ADMINISTRATIVE LAW SINCE 1961.

2. I MAKE THIS AFFIDAVIT AT THE REQUEST OF 'BANQUE DE FINANCEMENT S.A. 'FINABANK', GENEVA, WHICH I AM REPRESENTING AS AN ATTORNEY IN SWITZERLAND.

3. I HAVE READ THE AFFIDAVIT OF MATHIAS MAYOR, DATED JULY 17TH, 1975, AND MAKE THIS AFFIDAVIT IN RESPONSE THERETO.

4. IN REPLY TO PARAGRAPH 2, SUB-PARAGRAPH C OF MATHIAS MAYOR'S AFFIDAVIT, IT SHOULD BE SPECIFIED THAT FINABANK'S PETITION FOR A MORATORIUM DATED JUNE 19TH, 1973 WAS MADE WITH A VIEW TO OBTAINING AN ARRANGEMENT WITH ITS CREDITORS. SUCH A PETITION IS, UNDER SWISS LAW, THE FIRST NECESSARY STEP FOR SUCH AN ARRANGEMENT.

5. IN PARAGRAPH 3 OF THIS AFFIDAVIT, MR. MAYOR ASSERTS THAT 'AN ORDER OF THE COURT IN THE BANKING MORATORIUM PROCEEDING WOULD BE REQUIRED BEFORE FIDES WOULD BE AUTHORIZED TO FILE A PROCEEDING UNDER [illegible] FOREIGN BANKRUPTCY LAW'. WITH ALL DUE RESPECT TO MR. MAY[illegible] THAT IS NOT CORRECT. ARTICLE 35, PARAGRAPH 2 OF THE SWISS BANKING LAW QUOTED BY MR. MAYOR REFERS TO A COMPLETY DIFFERENT SITUATION, I.E. WHEN IT APPEARS, WITHIN A BANKING MORATORIUM, THAT THE BANK'S ASSETS ARE NOT SUFFICIENT TO COVER ITS LIABILITIES. IN SUCH A CASE, NO APPLICATION INTO THE COURT IS REQUIRED FROM THE PART OF THE COMMISSIONER AND, CONTRARY TO WHAT IS STATED BY MR. MAYOR, THE BANK IS ENTITLED TO DECLARE ITSELF A BANKRUPT OR TO APPLY FOR AN ORDINARY MORATORIUM (WITH A VIEW TO OBTAINING AN ARRANGEMENT WITH ITS CREDITORS) WITHOUT ANY PRIOR AUTHORIZATION FROM THE COURT, AS A MATTER OF FACT, THIS IS EXACTLY WHAT WAS DONE BY FINABANK THROUGH MY ABOVE MENTIONED APPLICATION DATED JUNE 19TH, 1973. THIS IS ALSO MADE VERY CLEAR BY THE FINAL WORDS IN MR. MAYOR'S QUOTATION OF THE SAID STATUTORY PROVISION: 'UNLESS THE BANK PETITIONS FOR AN ARRANGEMENT WITH CREDITORS'. THE ONLY PURPOSE OF THE SAID ARTICLE 35, PARAGRAPH 2 OF THE SWISS BANKING LAW IS TO ENABLE THE COURT TO SHORTEN THE DURATION OF THE BANKING MORATORIUM (WHICH IS NECESSARILY GRANTED FOR ONE YEAR UNDER ARTICLE 29, PARAGRAPH 2 OF THE SAME LAW), SHOULD IT APPEAR THAT THE BANK IS INSOLVENT WITHIN THE MEANING OF ARTICLE 35, PARAGRAPH 2 - WHICH IS THE CASE OF FINABANK.

6. THEREFORE, THE POSITION VERY CLEARLY IS, UNDER SWISS LAW, THAT A BANK THAT HAS OBTAINED A BANKING MORATORIUM IN ACCORDANCE WITH ARTICLE 29 OF THE SWISS BANKING LAW IS ENTITLED, AT ANY TIME, TO APPLY FOR AN ORDINARY MORATORIUM (WITH A VIEW TO OBTAINING AN ARRANGEMENT WITH ITS CREDITORS) OR (IF IT IS INSOLVENT) TO DECLARE ITSELF A BANKRUPT, WITHOUT ANY PRIOR AUTHORIZATION FROM ANY COURT. IT IS EVEN DISPUTABLE WHETHER SUCH AN APPLICATION FOR AN ORDINARY MORATORIUM OR SUCH A VOLONTARY DECLARATION OF BANKRUPTCY REQUIRES, UNDER SWISS LAW, THE CONSENT OF THE BANKING COMMISSIONER, IN MY OPINION, SUCH CONSENT SHOULD NOT BE REQUIRED, IN THE LIGHT OF ARTICLE 32, PARAGRAPH 2 OF THE SWISS BANKING LAW. THE QUESTION IS, HOWEVER IRRELEVANT, AS FINABANK'S PETITION IN THE U.S.A. UNDER CHAPTER XI WAS MADE WITH THE FORMAL APPROVAL OF FIDES.

7. IT SHOULD BE SPECIFIED THAT, UNDER SWISS LAW, A BANK THAT HAS BEEN GRANTED A MEMORATORIUM IN ACCORDANCE WITH ARTICLE 29 OF THE SWISS BANKING LAW REMAINS ENTITLED TO CONTINUE ITS BUSINESS NORMALLY, UNDER THE SUPERVISION OF THE APPOINTED COMMISSIONER, WITH THE EXCEPTION ONLY OF THE REPAYMENT OF 'OLD' CREDITORS (I.E. OF DEBTS ALREADY EXISTING UPON THE DATE OF THE APPLICATION FOR A BANKING MORATORIUM), THIS IS SPECIFIED CLEARLY BY ARTICLE 32, PARAGRAPH 2 OF THE SWISS BANKING LAW, WHICH READS AS FOLLOWS : 'DURING THE MORATORIUM, THE BANK CONTINUES ITS BUSINESS UNDER THE SUPERVISION OF THE COMMISSIONER AND IN ACCORDANCE WITH HIS INSTRUCTIONS, IT IS HOWEVER PROHIBITED TO TAKE ANY ACTION THAT WOULD BE DETRIMENTAL TO THE LEGITIMATE INTERESTS OF ITS CREDITORS OR THAT WOULD BRING ANY ADVANTAGE TO SOME OF THEM. ANY REPAYMENT IS SUBJECT TO THE AGREEMENT OF THE COMMISSIONER...'. IT IS, THEREFORE, QUITE CLEAR THAT, UNDER SWISS LAW, FIDES HAD, AS PROVISIONAL COMMISSIONER OF FINABANK, FULL POWER TO AUTHORIZE THE COMMENCEMENT OF ANY LEGAL PROCEEDINGS ABROAD, INCLUDING FOREIGN BANKRUPTCY PROCEEDINGS.

Western Union

8. ON JULY 14TH, 1975 A DECISION WAS RENDED BY THE FIRST SECTION OF THE GENEVA CIVIL COURT OF JUSTICE GRANTING FINABANK'S APPLICATION (DATED JUNE 19TH, 1975) FOR A SIX MONTHS MORATORIUM UNDER ARTICLE 37 OF THE SWISS BANKING LAW. THAT DECISION DESIGNATED AS COMMISSIONERS OF FINABANK FIDES, PIERRE ENGEL AND HENRI MAGNENAT, THE SAME DECISION ALSO DIRECTED THE COMMISSIONERS TO MAKE THE NECESSARY STEPS IN ACCORDANCE WITH SWISS LAW (I.E. MAINLY TO PREPARE A STATEMENT OF ASSETS AND LIABILITIES OF FINABANK) WITH A VIEW TO PROPOSING AN ARRANGEMENT WITH CREDITORS.

9. UNDER THE ABOVE MENTIONED MORATORIUM PROCEDURE, TWO SOLUTIONS CAN BE ENVISAGED AND HAVE ACTUALLY BEEN CONTEMPLATED BY FINABANK: EITHER ALL THE BANK'S ASSETS CAN BE DISTRIBUTED TO ITS CREDITORS, IN FULL SATISFACTION OF THEIR CLAIMS, SUCH A SOLUTION, WHICH IS TERMED ''CONCORDAT PAR ABANDON D'ACTIFS'', WOULD RESULT IN THE LIQUIDATION OF THE BANK, OR THE BANK'S ASSETS CAN BE DISTRIBUTED ONLY PARTIALLY, IN ORDER TO SECURE THE PAYMENT OF A CERTAIN PERCENTAGE (WHICH WOULD ALSO BE IN FULL SATISFACTION OF THE CREDITORS' CLAIMS), UNDER SUCH CIRCUMSTANCES AS WOULD ENABLE THE BANK TO RESUME ITS BUSINESS AFTER THE MORATORIUM, SUCH A SOLUTION IS TERMED ''CONCORDAT-DIVIDENDE'' (I.E. ''ARRANGEMENT ON A PERCENTAGE BASIS''). NO DECISION HAS BEEN MADE YET BY FINABANK REGARDING THE TYPE OF ARRANGEMENT THAT IT WILL PROPOSE, AND THE OUTCOME OF THE ARRANGEMENT PROCEDURE WILL NOT BE KNOWN UNTIL VOTED UPON BY THE BANK'S CREDITORS AND APPROVED BY THE SWISS COURT.

10. WITH REFERENCE TO PARAGRAPH 4 OF MR. MAYOR'S AFFIDAVIT, I DEEM IT UNNECESSARY TO ANSWER IT IN DETAIL, BUT SHALL SIMPLY STATE THAT NEITHER ARTICLE 273 OF THE SWISS CRIMINAL CODE NOR ARTICLE 47 OF THE SWISS BANKING LAW PREVENT A SWISS BANK FROM INITIATING LEGAL PROCEEDINGS BEFORE A FOREIGN COURT, INCLUDING BANKRUPTCY PROCEEDINGS. IT WOULD BE UNNECESSARY TO CONSIDER THE EXTENT TO WHICH BANKING SECRECY IS, UNDER SWISS LAW, PROTECTED WITHIN BANKRUPTCY PROCEEDINGS OR EVEN WITHIN AN ARRANGEMENT WITH CREDITORS. IT IS SUFFICIENT TO INDICATE THAT, IN ACCORDANCE WITH THE DECISION RENDERED BY THE GENEVA COURT OF JUSTICE ON JULY 14TH, 1975, AN ANNOUCEMENT INVITING ALL CREDITORS OF FINABANK TO NOTIFY THEIR CLAIMS TO THE COMMISSIONERS HAS BEEN PUBLISHED, WHICH MEANS THAT FINABANK WILL HAVE A COMPLETE LIST OF ALL ITS CREDITORS (WHETHER RECOGNIZED ONES OR SIMPLY ALLEDGED ONES). THEREFORE, TO THE EXTENT THAT THE LAW OF THE UNITED STATES WOULD REQUIRE THAT ALL CREDITORS OF FINABANK SHOULD BE GIVEN NOTICE OF THE CHAPTER XI PROCEEDINGS THAT HAVE BEEN COMMENCED IN NEW YORK, IT WOULD BE VERY EASY FOR THE COMMISSIONERS APPOINTED BY THE GENEVA COURT OF JUSTICE TO SEND SUCH A PERSONAL NOTICE TO EACH (ALLEDGED) CREDITOR OF FINABANK AND TO MAKE FOR YOUR COURT AN AFFIDAVIT WHEREBY THEY HAVE SENT SUCH A NOTICE, SO THAT THE REQUIREMENTS OF YOUR LAW WOULD BE SATISFIED WITHOUT ANY INFRINGEMENT OF SWISS BANKING SECRECY.

(SIGNED) PROF. CHARLES-ANDRE JUNOD

A 64

SUBSCRIBED AND SWORN BEFORE ME
THIS FIFTEENTH DAY OF AUGUST 1975

(SIGNED) PAUL TOURNIER, NOTARY PUBLIC

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TO : MUDGE ROSE GUTHRIE AND ALEXANDERNEW YORK
ATTENTION: MR RICHARD MARRIN OR MR J. KIRBY

FROM: BANQUE DE FINANCEMENT SA 'FINABANK'
EN SURSIS CONCORDATAIRE
GENEVA, SWITZERLAND

AUGUST 15, 1975

WE HAVE EXECUTED AND ARE SENDING TO YOU TODAY AN AFFIDAVIT AS FOLLOWS:

QUOTE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE	:	75 B (R.E.)
BANQUE DE FINANCEMENT SA 'FINABANK': EN SURSIS CONCORDATAIRE DEBTOR		AFFIDAVIT

A 66

CONFEDERATION OF SWITZERLAND)
) SS.:
REPUBLIC AND CANTON OF GENEVA)

MARIO OLIVERO, BEING DULY SWORN, DEPOSES AND SAYS:

1. I AM THE MANAGING DIRECTOR OF THE BANQUE DE FINANCEMENT S.A. 'FINABANK', EN SURSIS CONCORDATAIRE, (''FINABANK''). I HAVE PERSONAL KNOWLEDGE OF THE MATTERS HEREINAFTER REFERRED TO.

2. FINABANK IS A SWISS CORPORATION WHICH ENGAGES IN THE BUSINESS OF BANKING IN SWITZERLAND.

3. FINABANK DOES NOT AND NEVER HAS HAD AN OFFICE OR AGENT IN THE UNITED STATES.

4. FINABANK IS NOT LICENSED OR AUTHORIZED TO DO BUSINESS IN THE UNITED STATES. IT DOES NOT DO BUSINESS IN THE UNITED STATES NOR IS ITS BUSINESS REGULATED BY ANY FEDERAL OR STATE AGENCY OF THE UNITED STATES.

(SIGNED) MARIO OLIVERO

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 15TH DAY OF
AUGUST , 1975

(SIGNED) OLIVIER GAMPERT
NOTARY IN GENEVA

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YES TKS
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JEAN-MARIE FRANCOIS NUSBAUMER, being duly sworn, deposes and says:

1. I am the Principal Manager of Banque de Financement S.A. "Finabank", en sursis concordataire (Finabank). I have been the Principal Manager since January 1, 1971.

2. During the first week of May 1975, I met in Geneva with Mr. John Witmeyer, an associate of the firm of Mudge Rose Guthrie & Alexander, New York, which firm was acting as counsel for Finabank in the United States. I reviewed with Mr. Witmeyer a petition by Finabank for a proceeding for an arrangement in the United States District Court for the Southern District of New York. Thereafter, this petition was considered by Professor Charles-Andre Junod, counsel for Finabank in Geneva and by members of the Board of Directors of Finabank. Professor Junod and I communicated to Mudge Rose Guthrie & Alexander the decision of Finabank to file the above-described petition.

3. Since at this time Finabank, which had filed a petition for a postponement of maturity, and, at the direction of the Court of Justice, First Section, Republic and Canton of Switzerland was under the supervision of a provisional commissioner, Societe Fiduciaire Fides, the petition was also presented to Fides for its review and concurrence in the decision of Finabank. Fides, through

its manager, Frederic Hasler and its assistant-manager, Willy Becker, affirmed that the filing of the above-described petition had been authorized.

4. As a consequence of the above, Finabank directed Mudge Rose Guthrie & Alexander to file the petition.

Jean-Marie Francois Nusbaumer

Sworn to before me this
day of August, 1975.

Notary Public

AFFIDAVIT OF MARIO OLIVERO DATED AUGUST 15, 1975

in re : 75 b 764 (r.b.)

BANQUE DE FINANCEMENT S.A."FINABANK": AFFIDAVIT

en sursis concordataire

Debtor

A 69

CONFEDERATION OF SWITZERLAND)
) ss.:
REPUBLIC AND CANTON OF GENEVA)

Mario Olivero, being duly sworn, deposes and says:

1. I am the Managing Director of the Banque de Financement S.A. "FINABANK", en sursis concordataire, ("Finabank"). I have personal knowledge of the matters hereinafter referred to.

2. Finabank is a Swiss corporation which engages in the business of banking in Switzerland.

3. Finabank does not and never has had an office or agent in the United States.

4. Finabank is not licensed or authorized to do business in the United States. It does not do business in the United States nor is its business regulated by any Federal or State Agency of the United States.

Mario OLIVERO

Subscribed and sworn to before me this 15th day of August, 1975

OLIVIER GAMPERT NOTAIRE A GENEVE

A 70 AFFIDAVIT OF CHARLES-ANDRE JUNOD DATED AUGUST 15, 1975

CHARLES-ANDR JUNOD
PROFESSEUR A LA FACULTÉ DE DROIT
DE L'UNIVERSITÉ DE GENÈVE

GENÈVE, LE August 15th, 1975.
10, RUE DE LA CORRATERIE
TÉL. 21 70 77

AFFIDAVIT

For the
United States District Court
Southern District of New-York
in re
Banque de Financement S.A., in proceedings for
debtor an arrangement
75 b 764 (r.b.)

Charles-André Junod, being duly sworn, deposes and says :

1. I am an attorney duly admitted for over twenty years to the Geneva bar (Switzerland), and am a partner of the law firm Junod & Guyet, 10, rue de la Corraterie, Geneva, Switzerland. I am also a professor at the Faculty of Law of the University of Geneva, where I have been teaching, inter alia, administrative law since 1961.

2. I make this affidavit at the request of "Banque de Financement S.A. - Finabank", Geneva, which I am representing as an attorney in Switzerland.

3. I have read the affidavit of Mathias Mayor, dated July 17th, 1975, and make this affidavit in response thereto.

4. In reply to paragraph 2, sub-paragraph c of Mathias Mayor's affidavit, it should be specified that Finabank's petition for a moratorium dated June 19th, 1975 was made with a view to obtaining an arrangement with its creditors. Such a petition is, under Swiss law, the first necessary step for such an arrangement.

5. In paragraph 3 of his affidavit, Mr. Mayor asserts that "an order of the Court in the banking moratorium proceeding would be required before Fides would be authorized to file a proceeding under any foreign bankruptcy law". With all due respect to Mr. Mayor, that is not correct. Article 35, paragraph 2 of the Swiss banking law quoted by Mr. Mayor refers to a completly different situation, i.e. when it appears, within a banking moratorium, that the bank's assets are not sufficient to cover its liabilities. In such a case, no application to the Court is required from the part of the commissioner and, contrary to what is stated by Mr. Mayor, the bank is entitled to declare itself a bankrupt or to apply for an ordinary moratorium (with a view to obtaining an arrangement with its creditors) without any prior authorization

from the Court ; as a matter of fact, this is exactly what was done by Finabank through my above mentioned application dated June 19th, 1975 ; this is also made very clear by the final words in Mr. Mayor's quotation of the said statutory provision : "unless the bank petitions for an arrangement with creditors". The only purpose of the said article 35, paragraph 2 of the Swiss banking law is to enable the Court to shorten the duration of the banking moratorium (which is necessarily granted for one year under article 29, paragraph 2 of the same law), should it appear that the bank is insolvent within the meaning of article 35, paragraph 2 - which is the case of Finabank.

6. Therefore, the position very clearly is, under Swiss law, that a bank that has obtained a banking moratorium in accordance with article 29 of the Swiss banking law is entitled, at any time, to apply for an ordinary moratorium (with a view to obtaining an arrangement with its creditors) or (if it is insolvent) to declare itself a bankrupt, without any prior authorization from any Court. It is even disputable whether such an application for an ordinary moratorium or such a volontary declaration of bankruptcy requires, under Swiss law, the consent of the banking commissioner ; in my opinion, such consent should <u>not</u> be required, in the light of article 32,

paragraph 2 of the Swiss banking law. The question is, however, irrelevant, as Finabank's petition in the U.S.A. under chapter XI was made with the formal approval of Fides.

7. It should be specified that, under Swiss law, a bank that has been granted a moratorium in accordance with article 29 of the Swiss banking law remains entitled to continue its business normally, under the supervision of the appointed commissioner, with the exception only of the repayment of "old" creditors (i.e. of debts already existing upon the date of the application for a banking moratorium) ; this is specified clearly by article 32, paragraph 2 of the Swiss banking law, which reads as follows : "during the moratorium, the bank continues its business under the supervision of the commissioner and in accordance with his instructions ; it is however prohibited to take any action that would be detrimental to the legitimate interests of its creditors or that would bring any advantage to some of them. Any repayment is subject to the agreement of the commissioner...". It is, therefore, quite clear that, under Swiss law, Fides had, as provisional commissioner of Finabank, full power to authorize the commencement of any legal proceedings abroad, including foreign bankruptcy proceedings.

.../..

8. On July 14th, 1975, a decision was rendered by the first section of the Geneva civil Court of Justice granting Finabank's application (dated June 19th, 1975) for a six months moratorium under article 37 of the Swiss banking law. That decision designated as commissioners of Finabank Fides, Pierre Engel and Henri Magnenat ; the same decision also directed the commissioners to make the necessary steps in accordance with Swiss law (i.e. mainly to prepare a statement of assets and liabilities of Finabank) with a view to proposing an arrangement with creditors.

9. Under the above mentioned moratorium procedure, two solutions can be envisaged and have actually been contemplated by Finabank : either all the bank's assets can be distributed to its creditors, in full satisfaction of their claims ; such a solution, which is termed "concordat par abandon d'actifs", would result in the liquidation of the bank ; or the bank's assets can be distributed only partially, in order to secure the payment of a certain percentage (which would also be in full satisfaction of the creditors' claims), under such circumstances as would enable the bank to resume its business after the moratorium ; such a solution is termed "concordat-dividende" (i.e. "arrangement on a percentage basis"). No decision has been made yet by

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.../...

Finabank regarding the type of arrangement that it will propose, and the outcome of the arrangement procedure will not be known until voted upon by the bank's creditors and approved by the Swiss Court.

10. With reference to paragraph 4 of Mr. Mayor's affidavit, I deem it unnecessary to answer it in detail, but shall simply state that neither article 273 of the Swiss Criminal Code nor article 47 of the Swiss banking law prevent a Swiss bank from initiating legal proceedings before a foreign court, including bankruptcy proceedings. It would be unnecessary to consider the extent to which banking secrecy is, under Swiss law, protected within bankruptcy proceedings or even within an arrangement with creditors. It is sufficient to indicate that, in accordance with the decision rendered by the Geneva Court of Justice on July 14th, 1975, an announcement inviting all creditors of Finabank to notify their claims to the commissioners has been published, which means that Finabank will have a complete list of all its creditors (whether recognized ones or simply alledged ones. Therefore, to the extent that the law of the United States would require that all creditors of Finabank should be given notice of the chapter XI proceedings that have been commenced in New-York, it would be very

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easy for the commissioners apointed by the Geneva Court of Justice to send such a personal notice to each (alledged) creditor of Finabank and to make for your Court an affidavit whereby they have sent such a notice, so that the requirements of your law would be satisfied without any infringement of Swiss banking secrecy.



1975

(Prof. Charles-André JUNOD)

Subscribed and sworn before me this fifteenthday of August 1975.



(Paul TOURNIER, Notary public).

STIPULATION GRANTING LEAVE TO CHASE MANHATTEN BANK TO JOIN PENDING MOTION OF FIRST NATIONAL BANK OF BOSTON TO DISMISS. DATED AUGUST 18, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

In re	:	In Proceedings For An Arrangement No. 75 B. 764 (RB)
BANQUE DE FINANCEMENT, S.A.	:	
Debtor.	:	STIPULATION

- - - - - - - - - - - - - - - - - - x

WHEREAS, a Petition For An Arrangement pursuant to Chapter XI of the Bankruptcy Act was filed on May 7, 1975 in this Court (the "Court") on behalf of Banque De Financement, S.A. ("Finabank"), a Swiss banking corporation; and

WHEREAS, The Chase Manhattan Bank (National Association) ("Chase") instituted an action entitled The Chase Manhattan Bank, N.A. v. Banque De Financement, S.A., Index No. 75 Civ. 39 (HFW), in the Court, to recover from Finabank $491,000 plus interest on account of certain foreign exchange transactions between Chase and Finabank and Chase was granted an order of attachment in said action dated January 6, 1975 pursuant to which levies were made on property in the name of Finabank on deposit at Continental Bank International ("CBI"); and

WHEREAS, The First National Bank of Boston ("FNBB") filed an action in the Court against Finabank on January 20, 1975 alleging damages in the amount of $9,176,375 for breach of two forward foreign exchange contracts and FNBB was granted an order of attachment in said action dated January 20, 1975, pursuant to which levies were made on property in the name of Finabank on deposit at CBI; and

WHEREAS, FNBB has filed a motion to dismiss the within proceedings, which motion is presently pending before this Court; and

WHEREAS, Chase wishes to join FNBB in its motion to dismiss on the grounds set forth in said motion.

NOW, THEREFORE, the parties hereto stipulate and agree as follows:

1. Leave may be granted to Chase to join in the pending motion of FNBB to dismiss the within proceedings and an order may be entered in these proceedings without further notice permitting Chase to join in said motion as if it was a creditor objecting to the jurisdiction of the Court as of the time when the motion to dismiss of FNBB was made.

Dated: New York, New York
August 15, 1975

BANQUE DE FINANCEMENT, S.A.

By _____

THE FIRST NATIONAL BANK OF BOSTON

By _____

THE CHASE MANHATTAN BANK
(NATIONAL ASSOCIATION)

By _____

SO ORDERED

this day of August, 1975

_____
Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

In re

BANQUE DE FINANCEMENT, S.A.

Debtor

----------x

In Proceeding for an Arrangement

No. 75 B 764

AMENDED SCHEDULES OF DEBTOR
BANQUE DE FINANCEMENT S. A.
REQUIRED BY RULE 11-11 OF
THE BANKRUPTCY RULES, AND
LISTING OF NAMES AND ADDRESSES
OF DEBTOR'S PRINCIPAL CREDITORS

Mudge, Rose, Guthrie & Alexander
Attorneys for Debtor
Banque de Financement, S. A.
20 Broad Street
New York, New York 10005

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1. Name and residence.

a. What is your full name and social security number?
Banque de Financement S.A. "FINABANK". - No Social Security number.

b. Have you used, or been known by, any other names within the 6 years immediately preceding the filing of the original petition herein?
No.

c. Where do you now reside
2, rue de la Bourse
Geneva, Switzerland

d. Where else have you resided during the 6 years immediately preceding the filing of the original petition herein?
Not applicable.

2. Occupation and income.

a. What is your occupation ?
Engaged in banking business.

b. Where are you now employed ?
Not applicable

c. Have you been in a partnership with anyone, or engaged in any business during the 6 years immediately preceding the filing of the original petition herein ? (If so, give particulars, including names, dates, and places.)
No.

d. What amount of income have you received from your trade or profession during each of the 2 calendar years immediately preceding the filing of the original petition herein?
1974 - Loss of Swiss Francs 142,640,530.61
1973 - Profit of Swiss Francs 2,836,926.28

e. What amount of income have you received from other sources during each of these 2 years ?

Not applicable.

3. Tax returns and refunds.

a. Where did you file your last federal and state income tax returns for the 2 years immediately preceding the filing of the original petition herein?

No tax returns files in the United States or any state thereof.

b. What tax refunds (income and other) have you received during the year immediately preceding the filing of the original petition herein?

None in the United States.
In Switzerland, Swiss Francs 17,448.

c. To what tax refunds (income or other), if any, are you, or may you be, entitled ? (Give particulars, including information as to any refund payable jointly to you and your spouse or any other person.)

None in the United States.
In Switzerland, Swiss Francs 9,123.

4. Bank accounts and safe deposit boxes.

a. What bank accounts have you maintained, alone or together with any other person, and in your own or any other name within the 2 years immediately preceding the filing of the original petition herein? (Give the name and address of each bank, the name in which the deposit is maintained, and the name and address of every other person authorized to make withdrawals from such account.)

1) Exhibit A hereto shows list of banks and other depositaries of Finabank in the United States of America. Accounts in non-United States banks and other institutions will be supplied when assembled.

2) Exhibit B hereto is the current list of authorized signatories of Banque de Financement

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b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash, or other valuables within the 2 years immediately preceding the filing of the original petition herein? (Give the name and address of the bank or other depository, the name in which each box or other depository was kept, the name and address of every other person who had the right of access thereto, a brief description of the contents thereof, and, if the box has been surrendered, state when surrendered, or, if transferred, when transferred, and the name and address of the transferee.)

See answer to 4a supra.

5. Books and records.

a. Have you kept books of account or records relating to your affairs within the 2 years immediately preceding the filing of the original petition herein?

Yes.

b. In whose possessession are these books or records? (Give names and address.)

Ourselves

c. If any of these books or records are not available, explain.

Not applicable.

d) Have any books of account or records relating to your affairs been destroyed, lost, or otherwise disposed of whithin the 2 years immediately preceding the filing of the original petition herein? (If so, give particulars, including date of destruction, loss, or disposition, and reason therefor.)

No.

6. Property held for another person.

What property do you hold for any other person? (Give name and address of each prrson, and describe the property, or value thereof, and all writings relating thereto.

Property, held for various customers, which is the subject of action entitled Continental Bank v. Banque de Financement, et al.

See Exhibit C hereto

Other property: see Exhibit D hereto.

7. Prior bankruptcy.

What proceedings under the Bankruptcy Act have previously been brought by or against you? (State the location of the bankruptcy court, the nature and number of each proceeding, the date when it was files, and whether a discharge was granted or refused, the proceeding was dismissed, or a composition, arrangement, or plan was confirmed.)

None.

8. Receiverships, general assignments, and other modes of liquidation.

a. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver, trustee, or other liquidating agent? (If so, give a brief description of the property, the name and address of the receiver, trustee, or other agent, and, if the agent was appointed in a court proceeding, the name and location of the court and the nature of the proceeding.)

On January 10, 1975, pursuant to the laws of Switzerland, pursuant to the direction of the Swiss Banking Commission petitioner filed a petition for "sursis bancaire" (Postponement of Maturity) with the Première Section of the Court of Justice of the Canton of Geneva, Confederation of Switzerland. On January 20, 1975, a mandate was made by the Court of Justice, Canton of Geneva, Confederation of Switzerland, constituting FIDES Société Fiduciaire, a corporation organized under the laws of Switzerland with its place of business at Avenue de Champel 8c, 1206 Geneva, Switzerland, as Commissaire Provisoire, or Temporary Commissioner, of Finabank.

b. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within one year immediately preceding the filing of the original petition herein? (If so, give dates, the name and address of the assignee, and a brief statement of the terms of assignment or settlement.)

No.

9. Property in hands of third person.

Is any other person holding anything of value in which you have an interest? (Give name and address, location and description of the property, and circumstances of the holding.)

Yes, see answer to 10(c) infra.

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10. Suits, executions, and attachments.

a. Were you a party to any suit pending at the time of the filing of the original petition herein? (If so, give the name and location of the court and the title and nature of the proceeding.)

Yes, see answers to 10(b) and 10(c) infra.

b. Were you a party to any suit terminated within the year immediately preceding the filing of the original petitition herein? (If so, give the name and location of the court, the title and nature of the proceeding, and the result.)

1. Chase Manhattan Bank v. Banque de Financement S.A., United States District Court for the Southern District of New York; action for alleged breach on contract; stayed in the discovery stage by Rule 11-44 of the Bankruptcy rules.

2. First National Bank of Boston, v. Banque de Financement S.A. United States District Court for the Southern District of New York; alleged for alleged breach of contract; stayed in the discovery stage by Rule 11-44 of the Bankruptcy rules.

3. Continental Bank International v. Banque de Financement S.A. et al.; United States District Court for the Southern District of New York; interpleader action; stayed in the pleading stage by Rule 11-44 of the Bankruptcy rules.

4. Various actions outside of the United States of America, including: Societa Generale Immobiliare de Lavori di Utilita Puvlica e Agricola Societa Per Azioni v. Edilcentro International Limited et al.; Supreme Court (Equity side) Nassau, Commonwealth of the Bahamas.

c. Has any of your property been attached, garnished, or seized under any legal or equitable process within the 4 months immeditaely preceding the filing of the original petition herein? (If so, describe the property seized or person garnished, and at whose suit.)

Yes: 1) Attachment liens filed on funds on deposit at Chase Manhattan Bank, New York, New York, and Continental Bank International by alleged creditors of the prtitioner, including Chase Manhattan Bank, First National Bank of Boston and various actions outside the United States of America. 2) In addition,

Chase Manhattan and Continental Bank International have blocked various funds within the United States of America belonging to both Finabank and its customers.

11. Loans repaid.

What repayments on loans in whole or in part have you made during the year immediately preceding the filing of the original petition herein? (Give the name and address of the lender, the amount of the loan and when received, the amounts and dates of payments and, if the lender is a relative, the relationship.)

Efforts are being made to collect this information pertaining to loans in the United States of America, if any.

12. Transfers of property.

a. Have you made any gifts, other than ordinary and usual presents to family members and charitable donations, during the year immediately preceding the filing ot the original petition herein? (If so, give names and addresses of donees and dates, description, and value of gifts)

No.

b. Have you made any other transfer, absolute or for the purpose of security, or any other disposition, of real or tangible personal property during the year immediately and preceding the filing of the original petition herein? (Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and, if the transferee is a relative, the relationship, the consideration, if any, received therefor, and the disposition of such consideration.)

No.

13. Repossessions and returns.

Has any property been returned to, or repossessed by, the seller or by a secured party during the year immediately preceding the filing of the original petition herein? (If so, give particulars including the name and address of the party getting the property and its description and value.)

No.

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14. Losses.

a. Have you suffered any losses from fire, theft, or gambling during the year immediately preceding or since the filing of the original petition herein? (If so, give particulars, including dates, names, and places, and the amounts of money or value and general description of property lost.)

No.

b. Was the loss covered in whole or part by insurance? (If so, give particulars.)

Not applicable.

15. Payments or transfers to attorneys.

a. Have you consulted an attorney during the year immediately preceding or since the filing of the original petition herein? (Give date, name and address.)

Yes, 1) Mudge Rose Guthrie & Alexander, 20 Broad Street, New York

2) Courshon and Courshon, 1701 Meridian Avenue, Miami Beach, Florida

b. Have you during the year immediately preceding or since the filing of the original petition herein paid any money or transferred any property to the attorney or to any other person on his behalf? (If so, give particulars, including amount paid or value of property transferred and date of payment or transfer.)

Various amounts paid or transferred to legal Counsel outside of the United States of America for legal services rendered or to be rendered.

c. Have you, either during the year immediately preceding or since the filing of the original petition herein, agreed to pay any money or transfer any property to an attorney at law, or to any other person on his behalf? (If so, give particulars, including amount and terms of obligation.)

No, except in ordinary course of conducting affairs. See 15 (a) and 15 (b) supra.

CANTON OF GENEVA)
) ss:
CONFEDERATION OF SWITZERLAND)

The undersigned hereby swear that we have read the answers contained in the foregoing statement and that they are true to the best of our knowledge, information and belief.

Frédéric Hasler
Manager
FIDES Société Fiduciaire

a Court-appointed Commissioner of Banque de Financement S.A. "Finabank" en sursis concordataire

Roger Canonica

a Court-appointed Commissioner of Banque de Financement S.A. "Finabank" en sursis concordataire

Signed and sworn to before me this 21st day of November 1975

OLIVIER GAMPERT NOTAIRE A GENEVE

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EXHIBIT A

LIST OF BANKS AND OTHER DEPOSITARIES OF FINABANK
IN THE UNITED STATES OF AMERICA

Ares Equities Corporation, 1, Whitehall Street, 10004 New York

Bank of America, 300 Montgomery Street, San Francisco, Calif.

Bankers Trust Company, Post Office Box 318, New York, N.Y. 10015

Bache & Co., Inc., 100 Gold Street, New York, N.Y. 10038

Bear Stearns & Co., 1 Wall Street, New York, N.Y. 10005

A.G. Becker & Co., Inc., 55 Water Street, New York, N.Y. 10041

The Chase Manhattan Bank, 1 Chase Manhattan Plaza,
New York, N.Y. 10015

Chemical Bank, 20 Pine Street, New York, N.Y. 10015

Continental Bank International, one Liberty Plaza,
91 Liberty Street, New York, N.Y. 10006

Continental Illinois National Bank & Trust Company
of Chicago, 231 South La Salle Street, Chicago, Ill.

European American Bank and Trust Co., One World Trade Center
Suite 4747, New York, N.Y. 10048

Fahnestock & Company, 110 Wall Street, New York, N.Y. 10005

Federated Capital Management Associates, New York, N.Y.

Ferkauf Rozzen, 2 Pennsylvania Plaza, New York, N.Y. 10001

The First Boston Corporation, 20 Exchange Place, New York,
N.Y. 10005

Franklin National Bank, 130 Pearl Street, New York, N.Y.

Goldman, Sachs & Co., 20 Broad Street, New York, N.Y. 10005

Hardy Company, 25 Broad Street, New York, N.Y. 10004

Hentz International, 1 Western Union Internat. Plaza,
New York, N.Y. 10004

P.K. Hickey & Co., Inc., 80 Broadstreet, New York, N.Y.

W.E. Hutton & Co., 14 Wall Street, New York, N.Y. 10005

Irving Trust Company, 1 Wall Street, New York, N.Y. 10015

Kidder Peabody Inc., 10 Hanover Square, New York, N.Y. 10005

Laidlaw Coggeshall Inc., 20 Broad Street, New York, N.Y. 10005

Carl Loeb Rhoades & Co., 40 Wall Street, New York, N.Y.

Manufacturers Hanover Trust Company, P.O. Box 932,
New York, N.Y. 10015

./.

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
One Liberty Plaza, 165 Broadway, New York, N.Y. 10006

Morgan Guaranty Trust Company of New York,
23 Wall Street, New York, N.Y. 10015

Republic National Bank of New York
Fifth Avenue, New York, N.Y.

The Riggs National Bank, 1503 Pennsylvania Avenue,
Washington, D.C. 13

Shields & Company Inc., 44 Wall Street, New York, N.Y. 10005

Smith, Barney & Co. Inc., 20 Broad Street, New York, N.Y.10005

Thomson & McKinnon Auchincloss Kohlmeyer Inc., 2 Broadway,
New York, N.Y. 10004

White Weld & Co. Inc. One Liberty Plaza, 91 Liberty Street,
New York, N.Y. 10006

Winkler, Cantor, Pomboy & co., 485 Madison Avenue,
New York, N.Y. 10022

* * *

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Schedule A-1 -- Creditors having priority.

Nature of Claim	Name of creditor residence or place of business	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, or subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	Amount of Claim

a. Wages and commissions owing to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, not exceeding $600 to each, earned within 3 months before filing of petition :

paid currently

b. Taxes owing

(1) To the United States

$0.00

(2) To any state

$0.11

(3) To any other taxing authority

none

./..

Schedule A-1 -- Creditors having priority.

Nature of Claim	Name of creditor and residence or place of business	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, or subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	Amount of Claim

c. (1) Debts owing to any person, including United States, entitled to priority by laws of United States

none

(2) Rent owing to a landlord entitled to priority by laws of any state accrued within 3 months before filing of petition, for actual use and occupancy

none

total ..... US$ 0.11

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Schedule A-2 -- Creditors holding security.

21 NOV. 19[illegible]

Name of creditor and place of business	Description of security and date when obtained by creditor	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	Market Value	Amount of Claim without deduction of value of security
1) First National Bank of Boston	Attachment lien filed on 1/20/75 in action entitled First National Bank of Boston v. Banque de Financement	Claim arose from alleged failure to perform foreign exchange contract	Swiss francs 22.144.500	Swiss francs 22.144.500
2) Chase Manhattan Bank N.A.	Attachment lien filed on 1/7/75 in action entitled Chase Manhattan Bank v Banque de Financement	Claim arose from alleged failure to perform foreign exchange contract	Swiss francs 1.216.200	Swiss francs 1.216.200

3) Material is being gathered as to possible additional attachments in the United States of America.

Schedule A-3. Creditors having unsecured claims without priority

Name of creditor and residence or place of business	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	Amount of Claim
Not required	Swiss francs	164.561.585,90
Total.....	Swiss francs	164.561.585,90

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Schedule B.-- STATEMENT OF ALL PROPERTY OF BANKRUPT

Schedule B-1. -- Real property.

Description and location of all real property in which bankrupt has an interest	Nature of interest	Market value of bankrupt's interest without deduction for secured claims listed in Schedule A-2 or exemptions claimed in Schedule B-4
Premises at 2, rue de la Bourse, Geneva Switzerland	Ownership	Swiss francs 6.000.000
	total....	Swiss francs 6.000.000

Schedule B-2. -- Personal Property

Type of Property	Description and Location	Market value of bankrupt's interest without deduction for secured claims listed on Schedule A-2 or exemptions claimed in Schedule B-4
a. Cash on hand	Swiss francs	377,000.--
b. Deposits of money with banking institutions, savings, and loan associations, credit unions, public utility companies, landlords, and others	Swiss francs	89,795.000,--
c. Household goods, supplies, and furnishings		-0-
d. Books, pictures, and other art objects; stamp, coin, and other collections		-0-
e. Wearing apparel, jewelry, firearms, sports equipment, and other personal possessions		-0-
f. Automobiles, trucks, trailers and other vehicles		-0-
g. Boats, motors, and their accessories		-0-
h. Livestock, poultry, and other animals		-0-
i. Farming supplies and implements		-0-
j. Office equipment, furnishings, and supplies		estimated 300.000
k. Machinery, fixtures, equipment, and supplies (other than those listed in Items j and l) used in business		
l. Inventory		-0-
m. Tangible personal property of any other description		-0-

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Schedule B-2. -- Personal Property

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Type of Property	Description and Location	Market value of bankrupt's interest without deduction for secured claims listed on Schedule A-2 or exemptions claimed in Schedule B-4
n. Patents, copyrights, franchises, and other general intangibles		-0-
o. Government and corporate bonds and other negotiable and nonnegotiable instruments		2,353.000,--
p. Other liquidated debts owing bankrupt or debtor		fully reserved: net amount included in b. above
q. Contingent and unliquidated claims of every nature, including counterclaims of the bankrupt or debtor: cause of action against Interphoto Co. in connection with default upon guaranties-amount of claim to be supplied.		fully reserved: net amount included in b. above
r. Interests in insurance policies		-0-
s. Annuities		-0-
t. Stock and interests in incorporated and unincorporated companies		1.840.000
u. Interests in partnerships (estimated value)		3.000.000
v. Equitable and future interests, life estates, and rights or powers exercisable for the benefit of the bankrupt or debtor		-0-
	Total..... Swiss francs	97,673,000.--

CANTON OF GENEVA)
) ss:
CONFEDERATION OF SWITZERLAND)

The undersigned hereby swear that we have read the answers contained in the foregoing statement and that they are true to the best of our knowledge, information and belief.

Frédéric Hasler
Manager
FIDES Société Fiduciaire

a Court-appointed Commissioner of Banque de Financement S.A. "Finabank" en sursis concordataire

Roger Canonica

a Court-appointed Commissioner of Banque de Financement S.A. "Finabank" en sursis concordataire

Signed and sworn to before me this 21st day of November 1975

OLIVIER GAMPERT NOTAIRE A GENEVE

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EXHIBIT C

21 NOV. 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE FIRST NATIONAL BANK OF BOSTON :

Plaintiff, :

-against- :

BANQUL DE FINANCEMENT S.A. "FINABANK" :

Defendant. :

AFFIDAVIT

EMBASSY OF THE)
UNITED STATES OF AMERICA :) SS. :
CONFEDERATION OF SWITZERLAND)
CANTON OF BERNE)

JACQUES GIRARDIN, being duly sworn, deposes and says :

1. I am an authorized representative of the Société Fiduciaire Romande OFOR S.A., of Geneva, Switzerland, auditing firm officially authorized by the Swiss banking Commission to act as bank auditors and the auditors, as described in paragraphs 727 et seq. of the Swiss Code of Obligations and in the Swiss federal banking law, of Banque de Financement S.A. "FINABANK" (hereinafter Finabank) the Defendant. I am a qualified bank auditor approved by the Swiss Banking Commission.

2. I have examined the affidavit dated February 7, 1975 of Willy Becker, the Assistant Manager of FIDES Société Fiduciaire, the "Commissaire provisoire" (temporary commissioner) of Finabank.

3. I hereby state that funds described hereinafter, which are held in trust by Finabank, are the property of its customers. This statement is based on my having verified the posting in the customers' accounts of the purchase of the certificates of deposit and on my having

...

examined the activity in the accounts of the customers concerned since the dates on which the customers purchased such certificates of deposit until January 7, 1975. In addition, and on the basis of Finabank's records, I have ascertained the identity of the titular holders of the accounts.

These funds are :

a) certificates of deposit of Continental Illinois National Bank and Trust Co of Chicago (CINB) deposited with Continental Bank International, New York (CBI), listed in Exhibit A hereto and totaling $ 8.732.000.--;

b) certificates of deposit with maturities of up to January 21, 1975 inclusive, the proceeds of which totaling $ 2.245.310.-- were credited by CBI to an account labeled "Special account No 1" in the name of Finabank established by CBI on its books on January 8, 1975.

4. The Special account No 2 in the name of Finabank, opened by CBI on its books on January 9, 1975, recorded until January 31, 1975 the yield and/or the reimbursement of clients' deposits. Funds enumerated hereafter are deposited in the name of Finabank but for the account and risk of its clients in accordance with the terms of the duly signed trustee contracts which have been exhibited to me :

- $ 139.000,00 being a partial payment of interest due on January 10, 1975 on a loan made to Helliniki Techniki S.A., Athens;

- $ 943,75 being interest due on December 31, 1974 on a deposit with Williams & Glyn's Bank Ltd., London;

- $ 138.803,89 being the reimbursement of the principal of and interest on a deposit with First National City Bank, London as of January 16, 1975;

- $ 99.594,23 being the partial reimbursement of the principal of and interest on a deposit of $ 100.000.-- with Bank of America NT & SA, London, as of January 24, 1975.

6. With reference to paragraph 32 of Plaintiff's Interpleader Complaint (Continental Bank International, Plaintiff against Banque de Financement S.A. et al., Defendants), I hereby state that Finabank's instructions of January 7, 1975 to CBI to transfer to H. Albert de Bary & Co N.V., Amsterdam, the amounts of $ 209.000, $ 60.000 and $ 36.000 relate to the creation of deposits in the name of Finabank but for the account and risk of clients, in accordance with duly signed trustee contracts which have been exhibited to me. These transactions were initiated on January 3 and 6, 1975 for value January 7, 1975 and are confirmed on these dates by the correspondent.

7. My examination was limited to transactions relative to certificates of deposit and to deposits effected in the name of Finabank but for account and risk of clients, all other funds held in trust by Finabank not being included in the figures given hereinabove and in Exhibit A hereto.

...

8. In accordance with the accounting principles applicable in Switzerland, this means that the funds described hereinabove and in Exhibit A hereto are funds of Finabank's clients, not funds of Finubank.

Jacques GIRARDIN

Confederation of Switzerland
Town, Canton of Bern
Embassy of the United States
of America } ss.

Sworn before me this
23 day of May , 1975

RICHARD L. [illegible]
Consul of the United States of America

CERTIFICATES OF DEPOSIT

No.	principal	rate	maturity
[illegible]	$ 103.000,00	9-1/4	1-22-75
[illegible]	130.000,00	9-1/4	1-27-75
[illegible]	108.000,00	9-1/4	1-27-75
[illegible]	240.000,00	9-3/8	1-27-75
[illegible]	159.000,00	9	1-28-75
[illegible]	125.000,00	9-3/8	1-29-75
[illegible]	102.000,00	9-3/8	1-29-75
[illegible]	100.000,00	9-3/8	1-29-75
[illegible]	155.000,00	9-3/8	1-29-75
[illegible]	114.000,00	9-3/8	1-29-75
[illegible]	124.000,00	9-3/8	1-29-75
[illegible]	132.000,00	9-1/4	1-30-75
[illegible]	103.000,00	9-1/4	1-30-75
[illegible]	130.000,00	8-7/8	2- 3-75
[illegible]	104.000,00	8-7/8	2- 3-75
[illegible]	103.000,00	8-7/8	2- 3-75
[illegible]	102.000,00	8-7/8	2- 3-75
[illegible]	102.000,00	8-7/8	2- 3-75
[illegible]	102.000,00	8-7/8	2- 3-75
[illegible]	249.000,00	9-1/4	2- 3-75
[illegible]	197.000,00	9	2- 4-75
[illegible]	105.000,00	8-1/4	2- 6-75
[illegible]	128.000,00	8-7/8	2-10-75
[illegible]	139.000,00	8-7/8	2-11-75
[illegible]	110.000,00	8-7/8	2-11-75
[illegible]	145.000,00	8-5/8	2-13-75
[illegible]	142.000,00	8-5/8	2-13-75
[illegible]	100.000,00	12	2-18-75
[illegible]	183.000,00	8-5/8	2-18-75
[illegible]	146.000,00	8-5/8	2-18-75
[illegible]	104.000,00	8-5/8	2-18-75
[illegible]	408.000,00	9.4	2-25-75
[illegible]	307.000,00	9.4	2-25-75
[illegible]	252.000,00	9.4	2-25-75
[illegible]	231.000,00	9.4	2-25-75
[illegible]	100.000,00	9	3- 3-75
[illegible]	140.000,00	9-1/8	3- 4-75
[illegible]	103.000,00	9-1/8	3- 4-75
[illegible]	132.000,00	9-1/8	3- 4-75
[illegible]	105.000,00	9-1/8	3- 4-75
[illegible]	150.000,00	10-1/2	3- 5-75
[illegible]	144.000,00	8-3/4	3-20-75
[illegible]	156.000,00	8-3/4	3-12-75
[illegible]	112.000,00	8-7/8	3-27-75

Exhibit A

BEST COPY AVAILABLE

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B0[illegible]	141.000,00	8-7/8	3-26-75
B0[illegible]	130.000,00	8-7/8	3-24-75
B0[illegible]	127.000,00	8-7/8	3-26-75
B0[illegible]	100.000,00	8-7/8	3-26-75
B0[illegible]	107.000,00	8-7/8	3-26-75
B0[illegible]	104.000,00	8-7/8	3-26-75
B0[illegible]	250.000,00	9	3-27-75
B0[illegible]	146.000,00	9	3-31-75
B0[illegible]	100.000,00	8-7/8	3-31-75
B0[illegible]	121.000,00	8-7/8	4- 2-75
	$ 8.732.000,00		

EXHIBIT D A 103

Funds owned by clients of debtor on deposit with Chase Manhattan Bank as follows:

- 8 5/8%	Banker's acceptance of Chase, matured March 10, 1975	$ 30,000.-
- 8 3/4%	Certificate of deposit issued by Chase, matured April 2, 1975	$ 128,000.-
- 8 3/4%	Certificate of deposit issued by Chase, matured April 7, 1975	$ 139,000.-
		$ 297,000.-

plus interest

TRANSCRIPTS: JUNE 10, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

BANQUE DE FINANCEMENT,

Debtor.

No. 75 B 764

United States Court House
Foley Square, New York, N.Y.

June 10, 1975
9:30 o'clock a.m.

RULE XI-4 HEARING

Before:

HON. ROY BABITT,
Bankruptcy Judge

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

MUDGE, ROSE, GUTHRIE & ALEXANDER, ESQS.
Attorneys for the Debtor
20 Broad Street
New York, New York

BY: RICHARD S. MARRIN, ESQ., Of Counsel
-and-
JOHN WITMEYER, ESQ., Of Counsel

COUDERT BROTHERS, ESQS.
Attorneys for Credit Lyonnaise
200 Park Avenue
New York, New York

BY: GERALD J. DUNWORTH, ESQ., Of Counsel

MILBANK, TWEED, HADLEY & McCLOY, ESQS.
Attorneys for the Chase Manhattan Bank
1 Chase Manhattan Plaza
New York, New York

BY: ROGER BOYLE, ESQ., Of Counsel

CLEARY, GOTTLIEB, STEEN & HAMILTON, ESQS.
Attorneys for Firestone Bank Limited
1 State Street Plaza
New York, New York

BY: JAMES C. BLAIR, ESQ., Of Counsel

- - - - -

PROCEEDINGS

MR. MARRIN: Your Honor, with respect to the indemnity hearing, Banque De Financement

is not currently operating either here nor in Switzerland.

The funds in New York are at Continental and Chase Manhattan, and at least the funds in Continental are invested in certificates of deposit making money. I don't think there is any danger that the estate is going to be depleted and for that ground alone, I don't think a bond is required.

On top of that, Your Honor, there are certain problems over in Switzerland in deals with other banks that makes it very unlikely we can ever put over a Chapter XI in this situation.

THE COURT: Good. Let's adjudicate or dismiss it. Isn't anyone going to give me a motion on the ground that the Court is bereft of jurisdiction?

MR. MARRIN: I think that the jurisdiction remains under Chapter XI or straight liquidation.

THE COURT: If it can't be a bankrupt, it can't be a debtor. Where is the motion to dismiss? I have been inviting it since the disability in Herstatt.

Does the Court do this on its own?

MR. BOYLE: Your Honor - -

THE COURT: You want me to make the motion, argue it, then decide it?

MR. BOYLE: Our involvement is relative small.

THE COURT: You are not an attaching creditor?

MR. BOYLE: We are an attaching creditor. We started with a claim of roughly half a million dollars.

THE COURT: How much did you attach?

MR. BOYLE: We attached a huge amount at Continental by comparison with our claim.

THE COURT: It's not like using an elephant gun to kill a mosquito? What about it?

MR. BOYLE: Your Honor, we set off about a quarter of a million dollars, so we are left with only some two hundred thousand dollars, and we hold security in roughly that amount which we are unsure of as to the ultimate owner. We don't know whether they belong to Feenerbank (phonetics) or its customers and we are still trying to sort that out. It may well be we will be presenting a motion of the kind Your Honor

suggests.

THE COURT: You mean I haven't got a champion in this case?

MR. BOYLE: I suspect, Your Honor, if this shows signs of going forward - -

THE COURT: It can't go forward. On what basis could it go forward?

Who are you?

MR. DUNWORTH: I represent Credit Lyonnaise.

THE COURT: How much did you attach?

MR. DUNWORTH: We don't know the exact amount of our claim. We have just been retained and I filed a notice of appearance yesterday. We will get the details.

We didn't attach.

MR. BLAIR: I represent Firestone Bank Limited.

THE COURT: It's to your advantage to keep the case here. I can't look to a motion to dismiss from you.

MR. BLAIR: Firestone Bank Limited is one of the ten largest creditors. We are not an attacher.

THE COURT: I won't look for a motion to

dismiss from you. Did I understand when this came in, you told me of the fourteen, or so, million dollars in this country, twelve million dollars was actually customers' monies?

MR. MARRIN: Close to that figure. It might be twelve million dollars in this country.

THE COURT: How can anybody attach what is essentially to be trust funds?

MR. MARRIN: They tried to do it. We went before Judge Weinfeld in one action. He increased the bond close to one million dollars. In any event, it turned out to be their property.

We are inviting customers to come in and litigate in an interpleader.

MR. BLAIR: I would like to be heard on that, briefly. If they are claiming most of these funds to at least belong to others, although they are in Banque De Financement's name, we would like some protection if this is a debtor in possession they do not remove any of those funds from this country until there is an opportunity - -

THE COURT: First of all, there has been an attachment. Whether the attachment falls at

some future time I don't know, but there has been an attachment.

Everybody is restrained, as far as the attachers, from doing anything. I suppose it would not be inappropriate - -

MR. MARRIN: If I might say something else, in addition there is also an interpleader action. All that money is before Judge Pollock. We would have to get over that and the attachment.

I don't see how we can do that - -

MR. BLAIR: Unless jurisdiction is contested?

THE COURT: I don't know if the parties won't contest my jurisdiction, whether I am given any greater jurisdiction by forebearance. I always thought that the Supreme Court was of the view that the forebearance of the parties doesn't amplify the jurisdiction.

Could I hear a suit between a husband and wife who are divorcing?

MR. BLAIR: If this Court has jurisdiction and exercises jurisdiction, if there is no contention the orders of the interpleader are not worth making.

THE COURT: Where is the order to dismiss? Either I have subject matter jurisdiction or I don't.

MR. BLAIR: We want you to take jurisdiction.

THE COURT: If I were you, I would want me to take jurisdiction.

MR. MARRIN: We will be more than willing to consent to an order we won't remove the assets.

THE COURT: Why don't you give me an order -- it will make counsel feel better -- absolutely freezing all funds subject to the further order of this Court.

Even if I don't have jurisdiction, I can always release the funds to whoever does.

So, here we are.

MR. MARRIN: Your Honor, there is one creditor for over nine million dollars who has filed an attachment. I can't believe they are going to stay quiet. We fully expect --

THE COURT: Is there any power in the Court to designate counsel to bring a matter on raising subject matter jurisdiction?

MR. BOYLE: Your Honor, Chase is also --

we know the existence of this other creditor with an estate much larger than its own and we are relatively certain whatever you desire in the way of a motion will be forthcoming.

THE COURT: Of course, the answer may come from Judge Lasker who I understand has an appeal from the order from one of my colleagues sustaining jurisdiction over a foreign banking corporation.

This is a banking corporation, there is no dispute over that?

MR. MARRIN: No dispute.

THE COURT: I suppose there is no harm now. If I get a motion I will worry.

When is the first meeting set for? How are you going to get all the creditors?

MR. MARRIN: We are trying now to get the addresses of all the creditors. We filed with our petition a list of the name of all the creditors, and subsequently filed the ten largest plus all the ones involved in actions.

THE COURT: I will adjourn this then to the first meeting of creditors whenever it's fixed, but I would welcome an intervening motion

to dismiss.

Thank you, gentlemen.

- - - - -

114 TRANSCRIPT: DATED JULY 8, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of
BANQUE DE FINANCEMENT, S. A.,

Debtor.

No. 75 B 764

United States Court House
Foley Square, New York, N.Y.

July 8, 1975
9:00 o'clock a.m.

FIRST MEETING; ADJOURNED XI-4; N/M RE: JURISDICTION, ET CETERA

Before:

HON. ROY BABITT,
Bankruptcy Judge

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

A P P E A R A N C E S :

MUDGE, ROSE, GUTHRIE & ALEXANDER, ESQS.
Attorneys for the Debtor
20 Broad Street
New York, New York

BY: RICHARD B. MARRIN, ESQ., Of Counsel

WACHTELL, LIPTON, ROSEN & KATZ, ESQS.
Co-Counsel for the First National Bank of Boston
299 Park Avenue
New York, New York

BY: LEONARD M. ROSEN, ESQ., Of Counsel

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PROCEEDINGS

THE COURT: This is the first meeting of the creditors of Banque De Financement, S. A.

Any nominations for standby or tentative trustee?

(There was no response.)

THE COURT: Let the record show there is none and, I take it, for the committee, there is none.

Now, this is still a non-operating company, right?

MR. MARRIN: Yes, Your Honor.

THE COURT: What is happening?

MR. MARRIN: Well, basically all the funds in New York are tied up by the attachment for an interpleader action. In Switzerland they are all under a semi-government, semi-court, supervision.

There is one chance that the company stands to recover fifty million dollars to sixty million dollars of funds which would give fresh life if they could. The court has just ruled now - - it was on a TRO - - but, a fair reading of it does show that Banque De Financement has a right to this money.

THE COURT: Aren't there proceedings of a similar character going on in Europe?

MR. MARRIN: Similar to a Chapter XII.

THE COURT: Similar to Herstadt where they had the Konkurresom (phonetics) where the bankruptcy was pending?

MR. MARRIN: Yes, Your Honor.

THE COURT: I told you, Mr. Marrin, I don't see this as a Chapter XI proceeding.

MR. MARRIN: I agree, Your Honor.

THE COURT: I can't think of a less likely Chapter XI than this involving an estate where eighty-five percent belongs to key depositors and the only purpose of the Chapter XI was to frustrate the attacher.

We do have a motion to dismiss the Chapter XI?

MR. MARRIN: To dismiss the Chapter XI and on a jurisdictional ground, to dismiss any type of bankruptcy proceeding.

THE COURT: Let's see. The motion was brought by Messrs. Breed, Abbott?

MR. SHAW: Yes, Your Honor.

THE COURT: You are one of the attaching creditors?

MR. SHAW: Yes, Your Honor.

THE COURT: You made a motion, forgetting the technical ground, to dismiss by reason of the want of the Court's jurisdiction over this company as a debtor since you argue it could not be a bankrupt?

MR. SHAW: That is correct, Your Honor.

THE COURT: I have the added string in my bow, this is not fit meat for Chapter XI and I

would have the inherent power to dismiss by the authority of Ira Haupt against Plevanau.

MR. SHAW: That is correct, Your Honor.

THE COURT: Mr. Marrin?

MR. MARRIN: Your Honor, we agree with what you say, that you have the inherent power. As I think I have advised you before, there might be a consent to an adjudication, in any event.

I am waiting from Switzerland for word on whether there is a - -

THE COURT: Once he makes a motion to dismiss on subject matter jurisdiction, I don't have to adjudicate.

MR. MARRIN: I think that the Chapter XI - -

THE COURT: The statute provides anyone who can be a bankrupt can be a debot. If a guy can't be a bankrupt, he can't be a debtor. End of Chapter XI.

MR. MARRIN: I am probably concerned for the debtor so it wouldn't be prejudiced if you take the jurisdictional ground first, as to whether a foreign bank can be a bankrupt. I would suggest you do that first.

If you make it from a Chapter XI to a straight bankruptcy, I think Your Honor should appoint a trustee as soon as possible so he can get his counsel.

THE COURT: The difficulty with what you say is this Of course there is no question that the Court can always adjudicate a Chapter XI which should be aborted. The question here is jurisdictional.

If I can't administer the Chapter XI because I am bereft of power over a foreign banking corporation, I can't do anything with a bankruptcy which would ensue.

MR. MARRIN: I understand that.

THE COURT: It adds up to the same thing.

MR. MARRIN: I would suggest we brief that first.

THE COURT: There is nothing to brief. The question is squarely presented before a District Judge on the appeal from my colleague, Judge Galgay, that a foreign bank could be a bankrupt within the meaning of the Act. If that decision is affirmed and the final Court of Appellate review has run, then clearly I have jurisdiction,

right?

MR. MARRIN: Yes, Your Honor.

THE COURT: But I still can dismiss a Chapter XI with jurisdiction or adjudicate a Chapter XI - -

MR. MARRIN: I understand that - -

THE COURT: - - with jurisdiction and that is basically what Ira Haupt against Plevanau had said, if this is case not meat for a Chapter XI within the scheme of Congress' purpose, it would achieve no purpose for creditors.

I have a motion as to which I have received - - well, basically, you should not respond because this is probably more likely construed as a motion under Rule 12 of the Federal Rules, where the Court would take the allegations of the "complaint", meaning the petition, as well-pleaded and on the face of it the Court still has failed, as a matter of law, to be bereft of jurisdiction. Since they have added exhibits to these papers, I suppose that affectively converts it to a motion for summary judgment under Rule 12.

All right. That means you can, if you

would like, put in opposing papers. Some of the arguments made in support of this motion are technical in the last degree.

MR. MARRIN: Your Honor, I think First National, in its papers, indicated it wanted to file briefs in support of its motion. I wonder if they should file briefs and we respond to their briefs?

THE COURT: Done. You want to respond to this pleading. I have a simple notice of motion, which would have been enough; I have an affidavit in support by Mr. Shaw?

MR. SHAW: Yes, Your Honor.

THE COURT: Together with various exhibits annexed. I would say under Rule 12B that affectively converts this motion to one for summary judgment and I suppose if you have got nothing to controvert, you don't have to file anything if you don't want to.

MR. MARRIN: I think we will want to file an answer to the motion.

MR. SHAW: If Your Honor please, we would request an opportunity to file at least one additional affidavit which would be under the

third branch of our motion, the discretionary branch. It will relate to matters in Switzerland and Swiss law and I think we can do that - -

THE COURT: The trouble there is then I can't give you summary judgment because if foreign law is something, in fact, to be proved, how can I give you summary judgment?

I wouldn't do that if I were calling the shots.

MR. SHAW: I don't know if the strict foreign laws would be controverted. They relate to Swiss law and secrecy laws.

THE COURT: Do it if you care to.

MR. SHAW: What I would suggest is we get up a briefing schedule and we - -

THE COURT: Have oral argument?

MR. SHAW: Have oral argument at the conclusion of the briefing and if I could suggest we would file within, say, three weeks, any additional affidavits and briefs and then have the responding briefs and affidavits at some appropriate time.

THE COURT: By then maybe Judge Lasker will have decided the appeal now pending on the

Israel Bank which will, at least, let us know if we have any jurisdiction.

You might want to pay attention, Mr. Marrin, to the question of whether this is meat for a Chapter XI as Congress intended that statute to be.

MR. MARRIN: We intend to answer that in these papers. We think it is.

THE COURT: Do you want to put in your pleadings and exhibits at some prior time to the briefing schedule?

MR. MARRIN: We would like to get that within a week.

THE COURT: Supposing, Mr. Marrin, on the motion which is now before me to dismiss, you file any responsive affidavits, pleadings, or otherwise, by the 18th and - -

MR. MARRIN: Mr. Witmeyer brings up the point I take it this is without prejudice to our answering any affidavits that come in on Swiss law?

THE COURT: What was your timetable on that?

MR. SHAW: I think we can have any addi-

tional affidavits, I would say, within two weeks.

THE COURT: I don't think there is a great briefing schedule required here. I think all the ground has been pretty well trod in the Herstadt case and in the Israel Bank case.

Let's have the supporting or supplemental affidavits by the 23rd of July.

MR. SHAW: Very well.

THE COURT: I will give you until the 31st of July, Mr. Marrin, to file any responsive affidavits, pleadings, et cetera, and I shall require a brief in support of the motion, which you can start working on now, by August 4th. You really don't need more time.

MR. SHAW: That's fine, Your Honor.

THE COURT: You should be able to brief this in about five minutes. I can give you the cases now.

You, Mr. Marrin, who may have a tougher road to hoe shall give me your brief by August 18th. Will that be sufficient?

MR. MARRIN: That will be fine.

MR. BLAIR: I am James Blair from Cleary, Gottlieb, Steen & Hamilton.

Will I need leave of the Court to file a brief in support? I think this is a Rule 119 issue that has never been decided.

THE COURT: It's been raised.

MR. BLAIR: It needs briefing. It's why this Court should retain jurisdiction of this Chapter XI coordinated with a foreign Chapter XI.

THE COURT: Provided it's fit for a Chapter XI.

MR. BLAIR: If it's fit for the foreign one and this can be integrated - -

THE COURT: Who do you represent?

MR. BLAIR: I represent Firestone Bank, Zurich, Switzerland.

THE COURT: You are not an attacher?

MR. BLAIR: No.

THE COURT: Since you are charting new waters, why don't you give us your brief at the same time as everybody else. You have no one else to look to.

Why don't you give us yours by August 4th?

MR. BLAIR: That's in support. I am in opposition.

THE COURT: What is the difference?

MR. BLAIR: I would like to see here what they say in support.

THE COURT: I want to know what you are going to say. Rule 119 is about a year and a half old.

MR. BLAIR: They made a motion under Rule 119 and they have not briefed their basis for it.

THE COURT: You have until the 18th along with Mr. Marrin and I will grant you such leave. Now, I think I ought to set it down for oral argument.

MR. SHAW: I think we would like an opportunity for a reply brief.

THE COURT: I will get to the reply brief after I've heard oral argument.

Eight o'clock on Tuesday, the 19th. Is that terribly inconvenient?

MR. MARRIN: That's fine, Your Honor.

THE COURT: Mr. Shaw?

MR. SHAW: That's fine, Your Honor.

MR. BLAIR: That's fine.

THE COURT: Mr. Rosen?

MR. ROSEN: Fine, Your Honor.

THE COURT: At eight o'clock I will enter-

tain oral argument on the motion to dismiss. I suppose I ought to carry the Chapter XI just for an exercise along to that date. There is nothing definitive to be done.

There is no operation?

MR. MARRIN: Yes, Your Honor. There are no taxes owing, much less paid.

THE COURT: The debtor is directed to file its arrangement - - that's so I comply with Congress' purpose - - by August 15th. I will adjourn the Rule XI-4 hearing, which is what we are at today in part, to August 19th at eight a.m., and the first meeting will then be adjourned once more to comply with the scheme of the statute to September 4th at nine. All right, gentlemen?

MR. ROSEN: Thank you, Your Honor.

MR. MARRIN: Thank you, Your Honor.

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TRANSCRIPT: AUGUST 19, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

BANQUE DE FINANCEMENT.

Debtor.

No. 75 B 764

United States Court House
Foley Square, New York, N.Y.

August 19 1975
3:00 a.m.

ADJ RULE XI-4 HEARING;
NEW MOTION RE: JURISDICTION, ETC.

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

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THE COURT: Let's take the Chapter XI aspects first and get rid of them. The AFM is September 4th at nine.

I take it the debtor hasn't filed a plan yet?

MR. MARRIN: You are right, Your Honor.

THE COURT: There is no operation of any consequence and everything is pretty much status quo, is that right?

MR. MARRIN: That is right, Your Honor.

THE COURT: We will continue the debtor without indemnity until the date fixed for the first meeting, September 4th at nine.

The debtor is directed to file its arrangement by September 3rd.

That brings us now to a motion to dismiss by Breed, Abbott and Wachtell, Lipton jointly for the First National Bank of Boston, correct?

MR. SHAW: Yes, Your Honor.

THE COURT: On the motion to dismiss let me recount the papers I have. I have this paper sworn to in Switzerland by Mathias Mayor. I have an affidavit in opposition by Richard Marrin. Then I have another affidavit by Mr. Marrin filled a little later attaching certain exhibits among which are papers which will be formalized into affidavits.

MR. MARRIN: They are formalized. They are on their way over. I have one in my bag already.

THE COURT: Those are the pleadings?

MR. SHAW: Those are the basic, factual affidavits, yes, Your Honor.

THE COURT: I have the memorandum of law by you gentlemen; I have the debtor's memorandum of law in opposition; and Bank Firestone, Ltd. is also opposing-- that's Cleary, Gottlieb.

MR. BLAIR: Yes, Your Honor.

THE COURT: Those are the only protagonists in this proceeding?

MR. MINKEL: And the Chase Manhattan Bank. A stipulation has been filed.

THE COURT: Yes, I think I signed it allowing Chase to join in the motion to dismiss.

MR. MINKEL: That is correct.

THE COURT: You are not briefing the motion?

MR. MINKEL: No, Your Honor.

THE COURT: Those are the three memos of law and the pleadings I have. Okay. Now, first of all, are there any issues of fact?

MR. SHAW: Your Honor, I think there are no issues, fundamental issues of fact. However, of course, Finebank(phonetics) has the burden of proof here to sustain jurisdiction, and I think to say there is less - -

THE COURT: I don't think so.

MR. SHAW: Well, Your Honor, our Mr. Mayor states that the petition which was filed in Switzerland was a petition for a moritorium and that petition was never granted.

In fact, it was withdrawn in June and there were substituted other petitions for different kinds of moritoriums.

THE COURT: Well, would that make a terribly important difference here? If the single issue, as I view it, presented on a motion for summary

judgment - -which is what you are making - -is predicated on want of jurisdiction - -forgetting the question of deflection of jurisdiction- - If I don't have jurisdiction I obviously can't assume it for the purpose of deflecting it.

Isn't the question really whether this entity, a banking corporation, may be subjected to the bankruptcy laws of this country?

MR. SHAW: That's the principal question, yes, but not the only one.

THE COURT: There is no dispute this is (A) a banking institution engaged in the business of banking as that phrase has been construed; there is no dispute as to that?

MR. MARRIN: No dispute, Your Honor.

THE COURT: There is no dispute that Banque de Financement, S. A. is a corporation?

MR. SHAW: No dispute with that, Your Honor.

MR. MARRIN: No dispute.

THE COURT: It's not like the hybrid situation we had in Herstatt between a - -

MR. SHAW: None of that.

THE COURT: The case really boils down to whether or not this banking corporation engaged

in business may be the subject of a voluntary petition in Chapter XI inasmuch if it can't be a bankrupt it can't be a Chapter XI debtor, is that so?

MR. SHAW: That's the principal issue, Your Honor.

THE COURT: Why don't we turn to that first? It doesn't seem to me I need any great giving of evidence, whether documentary or testimonial, to really go into the extent to which the proceedings are pending abroad.

MR. SHAW: Well, Your Honor, we do have a threshhold point I would like to address you on briefly concerning it because I agree that the Section 4 issue is the principal issue.

But, we contend that the petition recites none of the fundamental jurisdictional allegations required by Section 323 and324.

Section 323 requires there be a statement of insolvency or inability to pay debts as they mature. This is where the dependency of this proceeding comes in.

What the petition alleges is that Finnebank - - and all that it alleges in supposed fulfillment

of those 323 requirements is that a petition had been filed for a moritorium in Oriensesbank (phonetics), whatever that means, in Switzerland, and it looked to the rehabilitation of this bank, and it states that the filing of the petition or the petition itself imposed a moritorium.

Now, those are the allegations in the petition to which Mudge, Rose now refers to as fulfilling the requirements of an allegation of insolvency or inability to pay.

THE COURT: Their argument being under the banking laws of Switzerland such moritorium constitutes or at least adds up to an inability to pay debts as they mature becuase they can't pay any debts. Is that what is meant?

MR. SHAW: I don't know. All they say is that a moritorium- - and as I say, Your Honor, the principal problem of fact is Mr. Mayor says there was a petition for a moritorium and it was denied.

Whether there was a moritorium in effect is open and up in the air and I don't, frankly, pretend to be an expert in Swiss Law, Lord knows, but I do have the Swiss Statute and I can't see that the filing of a petition itself imposed a

moritorium. I may say, in any event- -

THE COURT: We have to take testimony on foreign law?

MR. SHAW: The question is a fact one, does the petition recite enough in Your Honor's opinion that- -

THE COURT: To be a valid petition if this entity could be a Chapter XI debtor?

MR. SHAW: Yes. Does it state was 323 requires. Now, apart from the statement of insolvency, Your Honor, and this, I think, is perhaps clearer, there is no statement as required by 323 that Finnebank intends to file a plan pursuant to Chapter XI.

On the contrary, since they allege that they had filed a rehabilitation in Switzerland it is perfectly clear they never intend to and cannot file a plan over here and that missing statement, Your Honor, I suggest to you, robs them of any jurisdiction of this Court. There we have a direct contradiction.

THE COURT: You say that is a jurisdictional impediment because they didn't cast their prayer for relief in so many words?

MR. SHAW: I say, sir, that Section 323 mandates that allegation and it's our opinion that it must state that it intends to file a plan.

It is our position, Your Honor, that this was purely a holding action and also this, Your Honor, that we are perfectly certain that able counsel who represents Finnebank knew what they were doing. Any damn fool could read Sections 323 and 324.

And the reason it was not alleged in the simple, straightforward language of the Act and the rules is they couldn't and, in any event, they didn't and that's all that really matters here on the jurisdictional question, Your Honor.

In addition to that, Your Honor, Section 324 requires with the petition there be filed a list of creditors. On this subject again, Your Honor, there has been no listing of creditors either with the petition or since and at no time has anything been listed by Finnebank other than a list of bank creditors and the reason for this is under Swiss Laws and again, I think, on this subject there is no question of fact under the Swiss Law that Finnebank is prohibited from

disclosing the names of its creditors.

THE COURT: Meaning its depositors?

MR. SHAW: Not only depositors. This statement appears in Mr. Mayor's affidavit, Your Honor, paragraph 4- - in that paragraph he reviews the applicable Swiss statutes which carry criminal penalties and then sumarizes as follows:

"These provisions effectively prohibit it from furnishing a foreign court or from directly or indirectly making public the names and addresses of its depositors or creditors or divulging information concerning their dealings with Finnebank even after the filing of a plan for a composition with creditors or a bankruptcy."

That statement is not denied by any of the Finnebank Swiss Law experts. That is the situation.

It was perfectly clear, Your Honor, that Finnebank from the outset could not and would not comply with the American Law requiring the disclosure of the list of creditors and it has not done so.

Finnebank, of course, has a choice. It could comply with American Law or it could comply with Swiss Law. Having made its choice, having

decided it had to comply with Swiss Law I suggest to you, sir, it is clear that Finnebank is not entitled to the benefits of American Bankruptcy Law.

THE COURT: Of course, the most telling point about that citation is further, perhaps, evidence that Congress would not have intended to allow a foreign bank to avail themself of our law where there might be incanditions under their own law which would be inimicable to ours.

Since we could not compel compliance I guess Congress meant to have people go paddling elsewhere, we have our own problems.

MR. SHAW: I think that is correct, Your Honor. I think the deficiencies under 323, in addition, also suggest that - -

THE COURT: I am not altogether sure those are jurisdiction - -

MR. SHAW: We have cited a number of authorities to the effect they are jurisdictional, Your Honor.

THE COURT: Because Congress used the peremtory "shall" and not the inartistic "may." Douglas must have written a ton of stuff on that- -

"Judges and Legislators," among others, which is a speech he gave.

MR. SHAW: We have cited authority to the effect that a petition of this kind warrants and demands outright dismissal.

THE COURT: I don't have the good faith- - Remember, this is drawn a little differently than Chapter X. In Chapter X I could at the threshhold have been called on to rule that a petition for a Chapter X relief was not "filed in good faith." I don't seem to have that latitude in XI.

The good faith issue comes up later in another context but not at the threshhold. Either the plan is not in good faith, the acceptances to the plan are not in good faith, etc.

But, somehow the XI draftsmen didn't give me that initial look at the good faith of the petition which is really what you are talking to.

MR. SHAW: That may be, Your Honor, but the point is there has to be some minimum- -

THE COURT: Compliance with the statute. But, is it jurisdictional? Could they not amend their petition tomorrow?

MR. SHAW: I don't think they should be

allowed to. Of course, Your Honor, if we had an amendment problem then we would have a problem of relaying back, which is the name of the game- -

THE COURT: You mean the purpose of the XI to void attachments?

MR. SHAW: The whole key is timing.

THE COURT: Sure.

MR. SHAW: I may say the timing was that Finnebank lay back presumably waiting for some creditor to do something.

THE COURT: No creditor ever invoked the jurisdiction of this Court except these people?

MR. SHAW: Yes. I have listed in my affidavit the claimants to the fund. I don't have to get into the interpleader. There is an interpleader action pending and in that interpleader action there have been submitted claims by five American creditors in addition to the Bank of Boston which holds about $800,000 of which $491,000 is by Chase.

The foreign claimants who have filed in the interpleader- - there are about ten of them- - they come to a total of about $600,000 except for one Swiss bank which has a claim for about four

million dollars, so that the funds in the interpleader- - what we are urging, Your Honor is that a division of the money can be handled far better in the interpleader than here.

What we are really seeking is to have this matter adjudicated in the interpleader.

THE COURT: It could be adjudicated in the interpleader. They didn't come here to give me jurisdiction in the interpleader, they came here to give me jurisdiction over what they say is a viable XI.

MR. SHAW: They came here for the sole purpose of setting aside attachments.

THE COURT: They, in essence, on the face, gave jurisdiction, the Bankruptcy Act, to deal with all assets in this country.

MR. SHAW: Ostensibly- -

THE COURT: They didn't give me jurisdiction over its foreign assets.

MR. SHAW: The statute doesn't distinguish between local and foreign assets.

THE COURT: Section 2A(1) does.

MR. SHAW: That's a venue statute not a jurisdictional statute.

THE COURT: I have already made up my mind on that.

MR. SHAW: We will be glad to address that point, Your Honor. We did address it in the brief.

In any event, getting to the Section 4 issue which we all agree is the principal issue- -

THE COURT: If Judge Lasker affirms my colleague in the Israeli Bank that would be binding on me.

MR. SHAW: Your Honor might decide, however, that the circumstances here are somewhat different. You alluded to the fact that the continued appropriateness of this particular bank is particularly outstanding- -

THE COURT: What is the difference if a foreign bank can't come in appropriately or inappropriately, it's out?

MR. SHAW: We agree.

THE COURT: If Judge Lasker affirms the decision of my colleague on the Israeli Bank and rules as a matter of law that the bankruptcy laws of this country are not available to foreign corporations or are available I am stuck with this.

I may get to the rest of this if he says that the bankruptcy laws are available as Judge Galgay did.

MR. SHAW: I think so.

THE COURT: Should I not wait for Judge Lasker?

MR. SHAW: I know you have indicated that is what you are going to do.

THE COURT: I am sure he is not waiting for me.

MR. SHAW: He may not even know- -

THE COURT: He will know.

MR. SHAW: I think, Your Honor, that certainly is a practical course for you to take.

THE COURT: Sure. If Judge Lasker says you can't come into this Court and thereby reverses my colleague this case falls as a matter of law unless, of course, the Court of Appeals should reverse and I should decide to hold pending prompt appeal on that issue.

MR. SHAW: If he affirms Judge Galgay and says yes, you do have jurisdiction, then- -

THE COURT: Then I might get to the other questions you present- -(A) the jurisdictional

failure of the petitionor which I think is what you are getting to and (B) even assuming that these defects are not jurisdictional whether this Court should not deflect its jurisdiction in light of the realities of the case concerning the assets here, the assets there, who is involved there and what has been, and the fact we could not really administer this case fully by reason of the prohibition of the Swiss Penal Statute.

That is basically the case, right?

MR. SHAW: I think so, Your Honor. I think if Judge Lasker finds, as we hope, that Section 4 bars foreign banks that you would proceed to a decision in accordance with that decision and not await the Second Citcuit Court of Appeals.

THE COURT: I would, I would decide it. He is as binding on me as the Court of Appeals is on him.

MR. SHAW: Of course, we have the peculiar circumstances that an appeal of any decision of ours is going to go to a coordinate Judge of Judge Lasker.

THE COURT: We are not coordinated Judges.

MR. SHAW: If it went to Judge Bonsal from

you I am not sure Judge Bonsal would be bound.

THE COURT: I sure as hell would be.

MR. SHAW: I think a different case would be presented to the Court of Appeals. In any event, I would think, Your Honor, you would like to hear argument on Section 4.

THE COURT: I would like to hear one more rhapsody on that thing.

MR. SHAW: Your Honor, as you know, Section 4a- - and we want to concentrate on 4a because that is more applicable of the two subsections of Section 4 dealing with voluntary bankruptcy- -

As you know, in effect it says that a banking corporation shall not be entitled to the benefits of this Act as a voluntary bankrupt. The phrase "banking corporation" I don't think we have to pause a moment for.

It clearly means those corporations which are authorized by their own laws, the laws of their creation to conduct a banking business.

THE COURT: As a corporation?

MR. SHAW: As a corporation.

THE COURT: There is no dispute here this is a corporation under any legal system?

MR. SHAW: That it is a corporation and a banking corporation.

THE COURT: Okay.

MR. SHAW: Under those circumstances, Your Honor, it is our contention that the leading case governing this is the Valella case of the Supreme Court and in the Valella case the question was whether a particular insurance company was an insurance company within the meaning of the statute, and the Supreme Court said of Section 4a, dealing with involuntary bankruptcies, the affect of these provisions is there is no statute of bankruptcy as to the accepted corporation and, necessarily, there is no power in the District Court to include them or a court to extend the Act to corporations of either kind.

THE COURT: What kind of a corporation was this?

MR. SHAW: Insurance.

THE COURT: Domestic?

MR. SHAW: Domestic insurance company.

THE COURT: Isn't the issue here not whether Congress meant what it said, which it

clearly did, but whether what is said is extended to foreign banking corporations and foreign entities? That is really the question. I think it is a contrived question; I think the issue simply is whether or not it's a banking corporation.

In other words, you are saying they didn't leave any room for the court to use an adjective to modify that clear prohibition; banking corporation is in for all seasons and the court is not to then interpolate foreign, domestic or anything else?

MR. SHAW: That is absolutely correct; that is our basic argument. From the time it appears on its face it's a banking corporation, as it does here, and this court's authority is absolutely at an end.

There is a long line of authorities only a few of which we have cited in our brief. There is, Your Honor, under our view of this case, no occasion to get into legislative history. We, again, cite a long series of decisions.

THE COURT: You have twenty cases and

Sutherland on statutory construction will give you twenty with equal potentcy.

MR. SHAW: I think, Your Honor, the best case, or perhaps, the most meaningful case in this question is the Peoria Life Insurance case because it is a case that dealt with the Bankruptcy Act. In that case, if Your Honor recalls, the creditors were claiming that Section 4 meant to exclude only those corporations presently engaged in the insurance business and the court said well, that is a pretty good argument and maybe that is what Congress had in mind and - -

THE COURT: But they should have had it?

MR. SHAW: But they didn't say that and that was despositive to the Seventh Circuit which said the courts have no right to strain the language of a statute to bring about a result which is claimed what the purpose of Congress intending the statute when its language in no way indicates that purpose.

That language, I think, Your Honor, fits our case like a glove and I submit that the internal evidence in this very Section 4

also compels this result. The reason for that is it is literally impossible to read Section 4 sensibly and consistently without excluding foreign as well as domestic corporations and the reason for this, as Your Honor will recall from the Herstatt argument, I am sure, is in Section 4b we have two uses of the word "corporation." One is inclusive and the next is exclusive.

Section 4b says that any moneyed, business or commercial corporation except a building and loan association, a municipal railroad, insurance or banking corporations shall be subject to the provisions and entitled to the benefits of this Act.

THE COURT: Supposing we had a foreign banking corporation partnership here?

MR. SHAW: If we had a foreign banking partnership - -

THE COURT: I mean a real partnership?

MR. SHAW: If we had a real partnership it would appear it is not excluded and it would not fall under the name "corporation."

THE COURT: So?

MR. SHAW: So, I would say you and we can only do what Congress has enacted.

THE COURT: Do you really think Congress meant to exclude only the corporate-type entity and would be willing to accept jurisdiction over a non-corporate - - in other words, if it is a banking business, if it is in the nature of the business which is interdicted by the section - - insurance, banking, et cetera - - why do you suppose Congress would have limited itself only to a corporation? I agree that the statute as you argue it would not apply to an interdicted business simply because it didn't structure itself as a corporation.

MR. SHAW: All I can say to that, Your Honor, is it is not for us to question that. Congress has enacted it; that's the way Congress enacted it; and, I would assume courts would follow it and that is the dity of the court.

THE COURT: You are saying the language Congress wrote is to damned plain they couldn't have meant anything and if it's silly and does not go far enough that's their business. Do you want a citation the other way?

MR. SHAW: Your Honor, I don't regard, in any event, the concept that when they said banking corporation they meant both domestic and foreign to be silly and unreasonable. On the contrary, I think the inclusion of both is utterly and completely reasonable and on the other side of the coin, Your Honor, I suggest to you that to exclude domestic corporations from the benefit of voluntary bankruptcy and to include foreign banking corporations in the benefits of the Act is the unreasonable result.

THE COURT: There is a big difference. It may have appeared to Congress - - and we have no way of knowing - - that the Bankruptcy Forum is not appropriate for the liquidation of a bank and it's not appropriate for the liquidation of an entity which is insurance.

Most states already have regulations and procedures for the liquidation of banks. So, Congress may have reasoned we are not going to drop this on those bankruptcy fellows - - they are not important enough and they don't know enough. But, there is no regulation by the State of New York for a foreign bank and,

therefore, it could be argued that Congress damn well intended in the absence of such regulation and to protect American creditors where there are assets here the Bankruptcy Court is suited. That argument cuts both ways.

MR. SHAW: It certainly has been argued. That is what Finnabank has argued and that is precisely what Judge Galgay held.

I, however, suggest that is an erroneous reading. In fact, it is not a reading of the legislative history. The legislative history adds up to zero.

THE COURT: There is some evidence of what I received in Herstatt in which they speak of other means of regulations.

MR. SHAW: Let me go through it very briefly with Your Honor. As I said before, I would like to concentrate on the legislative history of Section 4a. Section ea has no ambiguity in its legislative history. It is clear.

The 1898 version of Section 4a states any person owing debts, except a corporation, shall be entitled to the benefits of this Act

as a voluntary bankrupt.

THE COURT: Right.

MR. SHAW: There is no question and nobody has ever suggested when they said except a corporation it excluded all corporations, domestic and foreign.

THE COURT: It would seem that way.

MR. SHAW: Section 4a in the 1910 Act is equally clear and it simply changed the concept to inclusion. Section 4a of the 1910 Act provides any person except a municipality, railroad or banking corporation shall be entitled to the benefits of the Act as a voluntary bankrupt.

I submit to you, again, there is no suggestion when they said the word "corporation" as modified by each of the four adjectives that a concept was to exclude only domestic corporations any more than there was in the 1898 version of 4a. That is the old legislative history.

THE COURT: That is not entirely complete. A corporation could not be a voluntary bankrupt?

MR. SHAW: That is correct.

THE COURT: A dozen years later they were permitted to become voluntary bankrupts and Congress carved out of the commercial world certain entities because of the business they ran?

MR. SHAW: Yes, that is correct.

THE COURT: We really don't know why they carved these out. The argument is precisely were they carved out because of what they are or what they do?

MR. SHAW: I am saying there is nothing in the legislative history which discusses the reasons why banks were excluded. The reason why they were exluced according to some of the comments made in the history is they are otherwise subject to regulations. I remember those words, I see them in front of me, I can tell you the page they are on. I will get to that in a minute.

What Congress did was to exclude these as you just said because of the nature of the business they did.

THE COURT: Sure.

MR. SHAW: That is the rationalization.

THE COURT: Why was the nature of the business so important to Congress to be excluded, and I suggest to you it's because those types of businesses were otherwise regulated by the various states of the union and those entities which were not engaged in that business are not - - Congress very well may have meant let them stay in the Bankruptcy Court, this forum is suited for that type of charade. That's the argument.

MR. SHAW: That is the argument.

THE COURT: Let me hear about the legislative history.

MR. SHAW: I have put it in the context of Section 4b. Section 4b in 1898 took the form of covering certain designated types of corporations which could be involuntary bankrupts. Very clearly, banking corporations were not in this designated class as mercantile corporations and this and that.

Banks were very clearly excluded; foreign and domestic were excluded by the first sentence of 4b in the 1898 Act.

THE COURT: Where is that?

MR. SHAW: This is in the 1898 version. In the 1898 version, Your Honor, the provisions was that only designated types of corporations - - manufacturing, trading, printing, publishing and mercantile pursuits.

THE COURT: A bank could not be considered a mercantile pursuit?

MR. SHAW: Clearly not. I have a case - -

THE COURT: I am not so sure that is right.

MR. SHAW: - - which did say it did not include - - there has never been any issue about that.

THE COURT: Which obscure court in Illinois?

MR. SHAW: I don't think there has been any issue that banking corporations were not covered by the - -

THE COURT: Section 4b?

MR. SHAW: - - by the first sentence of 4b. The whole problem about legislative ambiguity comes up in that second sentence of the 1898 Act, the private banker provision. That

second sentence just clearly was superfluous, it was unnecessary; banks were clearly not included in the inclusive group which could have an involuntary bankruptcy under the first sentence of Section 4b.

In 1910 when the legislature got around to rewriting this, the key quotes - - the ones that have been cited by Finnabank, the ones cited by Judge Galgay, cited all over the place in the Herstatt case - - by the sponsor of the 1910 bill, Congressman Shirley, to the affect that the 1910 Act did not change the laws with respect to banks at all, that statement can only be read to mean, Your Honor, that all banks, domestic and foreign, were to be excluded under the 1910 Act as they had been under the 1898 Act.

Foreign and domestic banks were completely excluded under the 1898 Act. They were not to be included under the 1910 Act. That is the whole meaning of the statement of Congressman Shirley.

Apart from Congressman Shirley, the principal argument you have alluded to is yours,

the alternative regulation theory, that Congress intended to exclude only banks which were subject not only to regulations but subject to state and federal regulations in this country. Finnabank - - again, I repeat, Your Honor, because I think this is very important in deciding this question - - Finnabank has the burden to establish there is jurisdiction here and I submit it will utterly fail.

THE COURT: That's where the burdens of going forward are.

MR. SHAW: The burden of establishing jurisdiction is always said to be on the proponent of jurisdiction.

THE COURT: I thought the burden here was on the one who wishes the court to say it has no jurisdiction.

MR. SHAW: No. We cite a Second Circuit case in that respect. It's the rule that the proponent has the burden. The Congress did not say it wished to apply this alternative regulation theory at all. Congress would - - they could have very simply said that. If it meant it, it didn't say that, and I say therefore,

it can't be imputed or implied.

Furthermore, Congress didn't say or propose this is the basis of the exclusion, that is, the alternative regulation theory, in any of the committee reports in 1910. On the contrary, the House Report which states the reasons why we are excluding these simply says because they are quasi-public corporations.

I admit that is quite unsatisfactory, but that is what the House Report says and Mr. Shirley in the very quotation that is commonly cited in the quotation where it didn't change the Act, constantly alluded to the fact these were quasi-public corporations. That was the justification for the exclusion.

As Your Honor said, it was a functional exclusion just as the inclusion in the 1898 Act, Section 4b, had been a functional inclusion. Now, it was a functional exclusion and I submit that is what Congress meant and, above all, that is what it said.

The whole issue of the alternative regulation has, in our judgment, been most definitively considered by Dean Soverign

(phonetics). I know Your Honor is very familiar with that excellent article by him.

He stated the honest objective observation has to come up in terms of the legislative history of Sections 4a and 4b. This is what he said in his article after an extensive survey of the whole legislative history.

What Dean Soverign says is it is - -

THE COURT: Didn't Professor Seligson or King comment on those individuals in an article in which he tried to respond?

MR. SHAW: Yes, he did.

THE COURT: There is some scholarly authority the other way.

MR. SHAW: I don't think in that article they say that Congress or, certainly, did they cite any kind of authority to the affect that Congress clearly - -

THE COURT: What did Soverign say?

MR. SHAW: What he said is, I think, the honest, fair and objective view - - whatever purpose Congress may have intended to achieve by excluding banking and insurance corporations or building and loan associations from

bankruptcy Section 4 does not clearly reveal them. I think that is a fair statement.

It is also the conslusion that has been reached by, I think, the summaries by the court. Of course, courts have had to deal with the question of whether a particular entity was or was not an insurance company or, particularly, a domestic one. And, in that context they have considered what did Congress mean.

In one of the earlier cases cited already we have an argument that it was an alternative regulation theory. Here we have an Oregon bank which is not governed by state or federal laws. Clearly Congress didn't mean that, Congress meant a banking corporation. The courts held that corporation was expunged from the Act. I think that's the same case in the Fourth Circuit which adopts a decision in the lower courts.

THE COURT: That was not a bank, was it?

MR. SHAW: Yes, Your Honor.

THE COURT: Wasn't that a partnership?

MR. SHAW: This was a fidelity insurance association.

THE COURT: Yes.

MR. SHAW: In the same case the court referred to a decision by Judge Sidley which the Fourth Circuit found wide acceptance for, and I quote:

"No reasons for making these exceptions were assigned by the committee of Congress. They may be surmised to lie in the public or quasi-public nature of the business involving other interests than those of creditors."

I submit a foreign banking corporation, particularly Finnabank, partakes of that public or quasi-public nature of the business involving the public.

If we are talking about the completeness of state regulations including the provision for insolvency then a Swiss bank clearly qualifies. The Swiss banking law is even tighter in its regulations, far m ore so than our local laws, and it certainly includes provisions for insolvency which Finnabank has invoked.

THE COURT: Congress isn't writing for the foreign mind; it's writing for ours.

MR. SHAW: It is writing for the

jurisdiction of this court and that's the decision that you have to make. In any event, the - - I want to emphasize this - - the reason, or intent, or surmise by the court as the intent of Congress enacting was the inappropriateness of the bankruptcy machinery to their affairs and that, of course, applies here - - the inappropriateness of a bankruptcy - -

THE COURT: Supposing it has all of its assets here, never did business and was a Swiss corporation, do you think that the machinery of this court would not be up to administering those assets either in the scheme of a bankruptcy or Chapter XI?

MR. SHAW: Given the Swiss law involving secrecy, the answer is emphatically yes.

THE COURT: Except I hold the money.

MR. SHAW: Yes. They are under criminal penalties.

THE COURT: I can tell the Swiss officials to enforce their laws.

MR. SHAW: In that circumstance it would be a good deal inappropriate to exercise jurisdiction.

THE COURT: I don't agree with you that this court is inappropriate. I don't think the bankrupcy machinery is necessarily unsuited or unable to rise to the task of liquidating or administering assets here for the benefit of creditors.

The only thing is the pecularity of Swiss law which will never give this court the full disclosure it needs. But, that goes to your second question, the appropriateness of the Chapter XI rather than the jurisdiction of this court.

MR. SHAW: No, Your Honor. I submit what it goes to, and you alluded to it a while ago, is it is perfectly possible to surmise that Congress had in mind just this kind of foreign regula ion of a bank which would make it particularly inappropriate to try to adjudicate it here.

THE COURT: It may be.

MR. SHAW: It would have been a very rational thing for Congress to do because banks are closely regulated throughout the civilized world and, accordingly, Congress may have had in

in mind that foreign banks are also closely regulated and their laws might be inconsistent with ours.

THE COURT: I am aware of that. But, the argument will cut both ways.

MR. SHAW: Your Honor, in addition, if Congress meant only to include or exclude those corporations which were closely regulated, it's unaccountable that they did not exclude other types of corporations which are closely regulated and the prime example is public utilities.

Apparently it was a functional task, that's all that one can say, because there are types of corporations more closely regulated than banks. In addition, we have the problem if you say foreign banks are not excluded by Section 4 then what about the foreign bank that is doing business in New York and is governed by the laws of the State of New York?

Now we begin to get the feeling that some foreign banks are excluded and others are not. We could also have the proper situation which I just advanced. You could say that the banks of Switzerland are closely regulated but

the banks of Nigeria are not so, so we will exclude Swiss banks and include Nigerian banks and then we have a very complicated piece of judicial legislation.

I say, again, excluding foreign banks as well as domestic banks is the reasonable result and the conference to grant the benefits of voluntary bankruptcy to foreign banks and not to domestics, is unreasonable and an irrational result.

Your Honor, there is a very recent Second Circuit case, Kevin Steel Products. I don't know if you are familiar with it.

THE COURT: I know it.

MR. SHAW: I submit that the teachings of the Kevin Steel case is enough to dispose of this case. In that case, which was a Chapter XI - -

THE COURT: I know the case well. I fail to see why it's anymore controlling on whether or not the statute, Section 313-1, should be read to include collective bargaining agreements.

MR. SHAW: The point is that the statute

clearly said under Secton 313 all contracts should - -

THE COURT: When I was with the United States I wrote an opinion on whether adoption meant a certain kind of adoption for the purpose of the Immigration Laws. If you want to see a job on statutory construction, look at that.

MR. SHAW: The point is that the Second Circuit refused to read the statute other than as Congress wrote it and I think the language - - and I would like to read it because I think it's most appropriate here - - .

THE COURT: Plain words have plain meanings to plain people.

MR. SHAW: I think this decision deals with the Bankruptcy Act and, also, deals with the question of exclusion and inclusion not recited by Congress.

The Second Circuit said that the Bankruptcy Act and the Labor Act, particularly the latter, have been subject to close scrutiny and - - this is the Kevin Steel decision - - (

"Both the Bankruptcy Act and the Labor Act, particularly the latter, have been

subject to close scrutiny and amendments, and despite numerous opportunities to change either or both acts with regard to the question before us, Congress has not done so."

THE COURT: Sure. There, my friend, there was a tension between two acts each of which has its place in history and its purpose, the Bankruptcy Act which is supposed to rehabilitate debtors whose financial condition is precarious and the national statute relating to the labor movement in America.

It was the tension between these two statutes to try to reconcile them which resulted in Kevin Steel and the Court of Appeals reconciled it in favor one over the other.

I don't have this problem of tension here, I have a simple statute and either I have the case or don't have the case.

MR. SHAW: That is precisely the point in Kevin Steel. There there was a far stronger argument for inserting a qualification in the Bankruptcy Act, a far stronger argument. There is no such tension here.

THE COURT: Would you like me to show you

a dozen cases in which Congress amended statutes in which Congress amended statutes in which a court either put in a modifier, took out a modifier? Come on, there's a million.

MR. SHAW: There may be but not with respect to the Bankruptcy Act.

THE COURT: You look in the American Surety Company against Marriott case, which incidentally, deals with words of exclusion.

MR. SHAW: I think your point if perfectly clear. My point is, then, on Section 4, that it has stood unamended for sixty-five years. The statute has been altered a number of times.

Section 4 has specifically been amended a number of times and at no time has Congress taken the step they could have taken had they intended what Finnabank intends and amended the statute.

Accordingly, I submit that Section 4 disposes of this case. Your Honor, we have made a point in favor of assuming that you find jurisdiction in the exercise of your inherent discretion as well as your discretion under Rule 119 to dismiss the proceeding outright.

What we have here is a Swiss bank which has first invoked the Swiss procedures, submitted itself to the jurisdiction of the Swiss court for rehabilitation, and then filed a petition knowing with this certain knowledge that it could not comply with the American laws, that it could not ever list its creditors or their affairs, that it could not or, in any event, it did not comply with Section 323 requirements, and it knew that it could not and would not file a plan for reorganization in this court, and it has not.

I submit that under those circumstances, Your Honor, and with the Swiss banking laws and the irreconcilable bar with the laws of this court, Finnabank does not deserve the benefits of voluntary bankruptcy or of the voluntary Chapter XI. Even now Finnabank has made no attempt to comply with the Act, has made no offer to comply with the Act.

It asks the court to fashion new and bizzare procedures to afford itself the benefit of the Swiss laws. It asks the court to comply with Swiss law at the expense of American law.

That is precisely what Finnabank is asking.

THE COURT: They are also asking something else, aren't they; they are also asking this court not to fashion a remedy but to take steps in regard of those creditors who jumped in on the assets in this country.

Aren't you really fighting to keep the fruits of your reis?

MR. SHAW: Certainly; absolutely, Your Honor.

THE COURT: Supposing the know they can't come into Chapter XI and know they are never going to put through a plan? Isn't it an affective device to block the attachments of those creditors who attached and thereby, at least, promote the equality provisions of the Act by making you all start at the same place until the gunshot?

MR. SHAW: They could have complied with the Act. I suggest they invoked the jurisdiction of this court in bad faith with sure knowledge they could not comply with the Act, and all of this is for the purpose of creditors who hold secret bank accounts in Switzerland

who are unwilling to be named in this court. Finnabank couldname them if they were willing to do so.

The court should know Finnabank has informed all of these secret depositors, according to the papers filed in interpleaders, and only two have come forward.

THE COURT: There is nothing sinister about the secretness. That's the way the Swiss want it.

MR. SHAW: Your Honor, all I can say is even Mr. Blair who opposes me on this motion and represents a Swiss bank has no use of any proceeding for the benefit of their creditors and he notes in his brief on that Finnabank, on the eve of its moratorium claimed that local assets, meaning the assets, were really held by it in some secret fiduciary capacity.

What you are really being asked to do is protect all these secret depositors who cannot, presumably, because of illegalities, for whatever reason, cannot and will not come forward as against a series of American creditors who have done nothing but to invoke the American law as

is their right to do.

THE COURT: You are asking me to reward you because you were firstest with the mostest which is also inimicable to the Bankruptcy Act.

MR. SHAW: I am asking you to allow the American law to take its course. That's all. And, that will be administered by Judge Bonsal and we can assume he will do a splendid job of it.

THE COURT: Probably far better. I wish you had spared me of this honor, to start with.

MR. SHAW: I would have spared you from the beginning. Mr. Blair begs this court not to send this assets back to Switzerland where the local American creditors would be at the mercy of the banking secrecy laws and they would be diverted to preferred secret creditors. That's what would happen; that's what Finnabank would do here.

THE COURT: He is saying this money belongs to the depositors. But, there are other creditors.

MR. SHAW: The only creditors whose names could be listed are banks. As Your Honor

must know, this bank is deeply involved in the affairs of Mr. Sindotta (phonetics). He has a banking corporation all over Europe.

What is involved here are a series of foreign transactions which are remote from this court. I suggest under the Birch case - - this was a decision in April by the Second Circuit and that decisions holds - - in affect, this is Judge Friendly's decision - - he said where a case involves principally foreign transactions then the District Court should consider very carefully whether Congress would have intended them to use the precious assets and very limited assets of the Federal Court to take on what is essentially a foreign problem or whether Congress would have intended them to leave the problem to the foreign courts and I suggest, Your Honor, that that is the context in which you are to judge this.

I suggest, Your Honor, that in judging in that fashion you will conclude that both in the exercise of your discretion and specifically under Section 4, there is no jurisdiction, there should be no jurisdiction in this court and,

therefore, the case should be dismissed outright.

THE COURT: Do you want to add anything, Mr. Rosen?

MR. ROSEN: No.

(At this time, a short recess was taken, and all parties subsequently returned.)

MR. MARRIN: Judge, if you want me to say nothing, I will be glad to do it. It's all briefed, and the like.

I would like to make two points or three points, very brief ones.

THE COURT: Please.

MR. MARRIN: First of all, the first twenty minutes of Mr. Shaw's argument can really be answered in the affidavit of Doctor Junod.

THE COURT: Do I have that?

MR. MARRIN: Yes. It's one of the Telexes attached to my affidavit. You have a final copy.

It deals with what the affect of a moratorium is. Obviously no one is going to

be paid any money unless they come forward here or in Switzerland.

THE COURT: In other words, they are going to have to identify themselves if they want to share.

MR. MARRIN: There is a public notice in the newspapers they have until September 10th to file their names and show their claims.

THE COURT: I was wondering about that, how under Swiss laws they could possibly share if they didn't disclose their names.

MR. MARRIN: We can give them notice of this meeting.

THE COURT: I guess the statute prohibts you from disclosure but it doesn't inhibit them from disclosing.

MR. MARRIN: It doesn't prohibit us with court supervision from writing a letter to each creditor and telling them about these proceedings. It's just so we couldn't publish the names.

THE COURT: How many dollars are involved in the country?

MR. MARRIN: About twelve million dollars.

THE COURT: How much is involved in the big picture?

MR. MARRIN: I would have to translate Swiss francs, about one hundred million.

MR. BLAIR: Our claim is one hundred ninety million in Swiss francs.

THE COURT: That's about three to a dollar. It's about eighty million dollars.

MR. MARRIN: Plus, Your Honor, there is a forty-six point five million dollar claim - -

THE COURT: You are talking about eighty million dollars. That's the big deal in Switzerland?

MR. MARRIN: We are talking about a nine million dollar attachment from the First National Bank of Boston. We have a twelve percent reduction for every creditor if they are allowed to get their money in full.

As far as the representations of Banque De Financement it didn't stop First National Bank of Boston. I think I will let it lie with just that.

THE COURT: You have not come up with any pre-legislature history outside the isolated

statements?

MR. MARRIN: We cited it all in here. I think it's clear.

THE COURT: How about the fact your petition is jurisdictionally defective and factually so and you and I both know, Mr. Marrin, you will not propose an arrangement, you can't propose an arrangement.

MR. MARRIN: That is not true. I think we might propose an arrangement.

THE COURT: But I might not find it in the best interest.

MR. MARRIN: There is a plan being discussed in Switzerland that would pay creditors a certain amount - -

THE COURT: If there is such a plan, why do I need you here?

MR. MARRIN: To get rid of this attachment and offer an identical plan or similar one here.

THE COURT: So the American creditors who raised this to protect themselves should be made to disgorge so some unnamed fat cats over there should get the funds, is that what you

are arguing?

MR. MARRIN: My point is to the extent people don't come in and claim money, those are funds of this estate.

THE COURT: You are telling American creditors give up nine million dollars, give up ten percent of the whole ballgame here for the benefit of foreign creditors.

Why should I worry about them?

MR. MARRIN: I think, firstly, the case law and statute says you have to.

THE COURT: Where does the statute say I have to? The statute says I have to, provided I can do it.

MR. MARRIN: I don't know why you can't do it.

THE COURT: My friend says "Banking Corporations" speaks for all seasons, foreign, domestic and lunar.

MR. MARRIN: He says we are not allowed to look at legislative intent and then says what Judge Friendly decided by legislative intent.

THE COURT: That's always part of the intrigue inherent in cases. Why should I tell

these people - - maybe I am being chauvanistic - - but, why should I tell them to now give it up and we are going to give it to people whose names I don't know or numbers I don't know.

Why should I labor for a lousy Chapter XI petition which may be jurisdictionally defective, probably not filed really in good faith.

If I had a good faith test I could not withstand a motion to dismiss upon the ground you can't do anything, and that we are only dealing with ten percent of the assets so that no matter how noble you and I are both, wer are only dealing with ten percent of the assets and can't touch the other ninety.

Why should I do all these things and thereby throw the American bank, the Rock of Boston, out? Why?

Why shouldn't I let them take the money and run? They are, after all, American, aren't they?

MR. MARRIN: If this were a British bank I might agree with you.

THE COURT: Why?

MR. MARRIN: Two reasons, Your Honor. First of all, I think the Bankrutcy Act said you could go into a Chapter XI or become a bankrupt if you had assets here without a principal place of business.

Secondly and more importantly, I think his last case that said something along the lines you suggested was the Oakley Bennett case in 1950. There the foreign country was Texas.

Your Honor, I think the sharing among all the creditors is uniform in the Swiss bankruptcy laws and United States bankruptcy laws. Everyone sort of bears the brutn of a loss.

THE COURT: Equally.

MR. MARRIN: Now, I mean, they are asking just the opposite.

THE COURT: They are saying the underlying scheme of the Bankruptcy Act does apply here.

MR. MARRIN: That's your threshhold question.

THE COURT: Tell me about your petition. Is it as bad as they say? - - The answer is yes. Can you do anything about it? - - The answer is no.

Why don't I throw you out now and stop waiting for Judge Lasker to spin wheels. Why don't I dismiss the petition in the exercise of a discretion I have? Does anyone doubt that I could not now adjudicate you a bankrupt because you didn't file a plan or dismiss it on the ground you didn't file a plan? No one doubts this right.

So, I could do this today and if I dismiss, he gets what he wants and I don't have to spin my wheels.

MR. MARRIN: We have an appeal, Judge.

THE COURT: I could do this. Certainly I am going to do it at some point if I take jurisdiction.

MR. MARRIN: But, you will put it into a liquidation.

THE COURT: I am very erratic. You don't know what I am going to do on any given day.

MR. MARRIN: I have heard that, Judge.

THE COURT: Why don't I dismiss it today. It's a bad XI; the petition is lousy; you are never going to go anywhere, you can't go anywhere; you are playing with one-tenth of the

assets in the name of unnamed people.

I would love to see the people's names just for gossip.

MR. MARRIN: I don't think the petition is all that defective.

THE COURT: You don't say you are insolvent or that you can't pay your debts; you don't say you intend to file a plan.

MR. MARRIN: We do.

THE COURT: Where do you say that?

MR. MARRIN: I think the whole phrase under Section 259 of the Swiss Federal Banking Code means an inability to pay debts as they come due.

THE COURT: You mean the moratorium?

MR. MARRIN: The moratorium.

THE COURT: Constitutes an inability to pay debts?

MR. MARRIN: Yes.

THE COURT: This is unquestionably the affect of the Swiss law as towhich I don't have to take testimony?

MR. MARRIN: That is a matter of law.

THE COURT: Let's assume you were over

that hurdle. What about intent to propose an arrangement with your creditors?

MR. MARRIN: I don't think we would have even captioned a Chapter XI if this wasn't our intent.

THE COURT: Why do you suppose Congress used the peremptory "shall" instead of the permissive "may"? Don't you think they focused on this?

MR. MARRIN: You are probably right. I think the earlier problem was whether a plan has to be filed at the time and Congress found that many bankruptcy judges were ignoring the necessity of filing a plan with the original petition.

THE COURT: Don't the new rules use "shall"?

MR. MARRIN: They also say substantive compliance.

THE COURT: It wouldn't be jurisdictionally defective, it would be amendable.

MR. MARRIN: We would like our day in court to show this petition was filed in good faith.

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THE COURT: I hope you are not putting your reputation on putting through an XI.

MR. MARRIN: I am talking about what happened on May 5th when it was filed. Your Honor can switch us over to a liquidation and that would go back to the original petition.

THE COURT: There is no doubt if I have jurisdiction I would adjudicate you at some stage of the proceeding simply because there is twelve million dollars here.

Why should I bother; why do I want to be such a nasty person to the American banks?

MR. MARRIN: I think you do have to protect the creditors in general.

THE COURT: Yes, sir?

MR. BLAIR: Your Honor, my name is James Blair representing Bank Firestone. I wanted to make clear if these assets are included in the general estate it will mean six hundred thousand dollars to one million dollars more to my client.

We have a real interest. We are listed; we were a Swiss bank wholly owned by an American corporation.

We understood the advice of our Swiss

counsel is we could not safely under Swiss law ourselves come here to attach. There was not an equal reis.

THE COURT: If I take jurisdiction and set aside these attachments how would you benefit by that amount?

MR. BLAIR: If these amounts were included in the general estate it will increase our share of the estate from six hundred thousand dollars to one million dollars. So, we feel very deeply on this.

THE COURT: You are just as American.

MR. BLAIR: We are wholly owned by an American corporation which bore the loss.

THE COURT: See that, now we have the Tories on the other side.

MR. BLAIR: And now, as far as whether this court has the discretion to decline jurisdiction here, I have briefed it. I don't believe the court has that jurisdiction.

THE COURT: If I have jurisdiction, I have it.

MR. BLAIR: If you have jurisdiction, given this situation, I think it is mandatory

you take it.

THE COURT: I could then dismiss for failure to comply with Chapter XI.

MR. BLAIR: You could proceed under Section 376.

THE COURT: It seems it comes to the same end, except in between I knock them out.

MR. BLAIR: As far as inability to list their depositors, again, in our brief we go at length into the history of Section 2(a)2 and what it was intended to accomplish and the tools it gives the court.

With those tools, there is no problem that this court has the tools available to achieve a Chapter XI as intended by our Act in this circumstance.

THE COURT: Including the assets over there?

MR. BLAIR: Including the assets over there.

THE COURT: No, you can't mean that.

MR. BLAIR: the court can transfer the assets over there assuming - -

THE COURT: For them to administer?

MR. BLAIR: Assuming there is going to be an equality of treatment.

THE COURT: I thought I understood you to say if I took jurisdiction I could put through an XI of all of the assets including the Swiss ones.

MR. BLAIR: I am saying you could sustain jurisdiction and transfer the assets there; you could have an intricate plan here where you have assets here but look at their plan to see it is closely integrated.

There are a number of different tools and Rule 119, the history of it, and the writings on it were intended to give the court the tools to deal with this kind of situation.

THE COURT: In other words, I could deflect my jurisdiction but first I have to decide if I have it?

MR. BLAIR: First you have to decide if you have it.

THE COURT: You say if I have it there is no harm being done, take it, send it over there and en route we knock them out?

MR. BLAIR: I am talking about on May 1st

- - excuse me, Your Honor, May 5th - - when they filed there was no inherent impediment. Whether they are now about to do something in Switzerland that would justify you from doing something, is a later question that comes not on your initially taking jurisdiction.

Then, on their allegation they do say they applied for a moratorium of the Swiss laws. Swiss law expressly says they may make an application only when they are not in a position to meet their debts as they mature. So, they have alleged they are not in that position.

THE COURT: They allege the bottom line.

MR. BLAIR: Secondly, the moratorium they applied for in Switzerland is an arrangement as defined in Section 306 of the Act. They applied for an arrangement in Switzerland which at that time contemplated full payment under 306, so to say they could not have proposed an arrangement here is not true.

In other words, the fact their sole motive here was to set aside attachments is recognized as a wholly proper motive and, indeed, a testified sole motive, where there are local

assets of a foreign debtor. There is no problem this court has the tools available May 5th, given the situation. There was nothing inherent in this situation that would prevent the kind of proceeding here that was contemplated by 2(a)22, 119 and the like.

Now, what has happened since then may well cause the court to proceed under Section 376 but that sets aside the attachments and that accepts there is an original jurisdiction.

THE COURT: Okay. Anyone else?

MR. SHAW: Just two points, really. I find nothing to reply to in Mr. Marrin's argument but with respect to Mr. Blair, it should be emphasized that when Mr. Blair talks about transferring assets, he represents a Swiss bank and - - it may be a wholly owned subsidiary of Firestone but, nevertheless, it is a Swiss bank and as such is one of the boys over in Zurich.

Furthermore, Mr. Blair referred to Swiss law and the moratorium. What happened was there was a petition for a moratorium which was not granted and, indeed, was withdrawn and, accordingly, a bare allegation that that petition for

a moratorium was filed is not a substitute for the direct - -

THE COURT: Supposing they withdraw and have now filed?

MR. SHAW: They have filed, but under a different provision.

THE COURT: Wouldn't that cure it?

MR. SHAW: It wouldn't cure it in the sense of relating back, in any event. I suggest to you, Your Honor, that if they wish to file, they would have to file anew. There is nothing to convert. That is our position.

The whole thing is too intangible to give enough substance to convert it into anything else. If the Firestone Bank or Finnabank itself wishes to file now in straight bankruptcy, they should file anew.

THE COURT: You keep the proceeds, you say?

MR. SHAW: And the proceeds of these attachments would be decided in an interpleader action before Judge Bonsal. Judge, thank you.

THE COURT: I have all the papers I need then. Thank you, all.

A 194 TRANSCRIPT: SEPTEMBER 4, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

BANQUE DE FINANCEMENT,

Debtor.

No. 75 B 764

United States Court House
Foley Square, New York, N.Y.

September 4, 1975
9:00 o'clock a.m.

ADJOURNED FIRST MEETING; ADJOURNED XI-4 HEARING

Before:

HON. ROY BABITT,
Bankruptcy Judge

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

MUDGE, ROSE, GUTHRIE & ALEXANDER, ESQS.
Attorneys for the Deltor
20 Broad Street
New York, New York

BY: RICHARD B. MARRIN, ESQ., Of Counsel

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PROCEEDINGS

THE COURT: I take it while the Court ponders the motion to dismiss and there being no operations here, we might as well adjourn this, is that the point, Mr. Marrin?

MR. MARRIN: Yes, Your Honor. There is one matter I would like to ask for the Court's suggestion on. Our assets are all tied up in an interpleader action before Judge Bonsal.

THE COURT: Yes, I know.

MR. MARRIN: We have met with Judge Bonsal and all of the parties in that action would agree to make a motion before Your Honor to lift the stay up to judgment. There are two actions pending, one by Chase Manhattan and one by the National Bank of Boston, contract actions.

THE COURT: Against this debtor?

MR. MARRIN: Against this debtor, Your Honor.

THE COURT: Would they not be stayed?

MR. MARRIN: They are stayed. Those two institutions have claims in the interpleader action. Perhaps the interpleader action would be the best forum to litigate it.

THE COURT: If you will give me an order of the debtor on consent - -

MR. MARRIN: We have one objectant.

THE COURT: Who is that?

MR. MARRIN: Bank Firestone. I think we would have to make the motion. We tried doing it by consent. Everyone agreed except Bank Firestone.

So, I have to make a motion on notice. I want to know what you feel is the best date for you to hear it.

THE COURT: Tell me. How pressing is it?

MR. MARRIN: We ought to get going, Your Honor. There are a lot of customers' monies tied up.

THE COURT: Now, I take it it will be a

multi-pronged motion?

MR. MARRIN: Yes, it will be, to lift the stay in the interpleader action and lift the stay for the purpose of consolidating Boston Bank's and Chase's action with the interpleader.

THE COURT: Why would there be any objection to this?

MR. MARRIN: Well, Mr. Blair of Cleary, Gottlieb gave me the impression he was afraid Your Honor would somehow lose jurisdiction over these cases.

THE COURT: I may lose jurisdiction by deciding a motion to dismiss.

MR. MARRIN: Exactly, Your Honor, but this is all assuming - -

THE COURT: I am told by Judge Lasker's chambers that the decision in the Israeli Bank will be down within this month, which may render academic my pondering of the great legal question of the time.

Well, let's do this, why don't you count on making the motion returnable October 9th at eight-thirty here. Draw your papers on that basis, eight-thirty on October 9th, and we will then see

whether we will entertain argument or if there is anything else to do.

MR. WEISZ: I am George Weisz from Cleary, Gottlieb, Steen & Hamilton, representing Firestone Bank.

We would like to see what the papers are and how selective a lifting of the stay they are talking about. There is additional money in the interpleader not claimed by attachment.

THE COURT: I am going to adjourn these Chapter XI aspects to October 9th at eight-thirty and direct the debtor to file its arrangement, just to keep the statutory scheme satisfied, by October 8th.

Thank you, Mr. Weisz and Mr. Marrin.

MR. MARRIN: Thank you, Your Honor.

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TRANSCRIPT: OCTOBER 9, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

BANQUE DE FINANCEMENT,

Debtor.

No. 75 B 764

United States Court House
Foley Square, New York, N.Y.

October 9, 1975
8:30 o'clock a.m.

ADJOURNED FIRST MEETING; ADJOURNED XI-4;
SUMMONS AND COMPLAINT (CONTINENTAL BANK)

Before:

HON. ROY BABITT,
Bankruptcy Judge

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

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Attorneys for the Debtor
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New York, New York

BY: RICHARD B. MARRIN, ESQ., Of Counsel

CLEARY, GOTTLIEB, STEEN & HAMILTON, ESQS.
Attorneys for Bank Firestone
1 State Street Plaza
New York, New York

BY: JAMES BLAIR, ESQ., Of Counsel

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PROCEEDINGS

MR. MARRIN: Judge, we have on this morning the action to lift the stay.

THE COURT: Was an answer filed?

MR. MARRIN: An answer has been filed by many of the defendants. Mr. Blair has proposed an alternative. We have spoken about it and I think we can reach something.

THE COURT: Bank Firestone answered?

MR. MARRIN: Yes. We has asked for release of the stay through judgment, but short of discussion, he suggested release of the stay through dis-

covery but short ot judgment because of a fear that a judgment would become an equitable lien.

He can explain his own position. We would be willing, for the time being, to at least get discovery going and let whatever interested party who wants to go to judgment, appear before Your Honor and then take the necessary steps.

THE COURT: Well, I expect to come to a decision very quickly on the motion to dismiss. As a matter of fact, I have information which suggests that Judge Lasker's decision in the Israeli Bank will be down within a few days. I don't know which way it will go.

If he finds the Court has no jurisdiction, I am going to grant the motion to dismiss on that ground alone, and then you can all go to the Court of Appeals together. If, on the other hand, he decides that the Court does have jurisdiction, I am about ready on the other prong of the motion as to whether or not granted the Court has jurisdiction, whether this is a fit case for Chapter XI, and I think, therefore, if the case is dismissed in this court, there is no reason for me to get involved in this when the stay of the XI-44 will fall with it.

How is that?

MR. BLAIR: That is perfectly all right. Since that issue will be in court for some time, I see no reason why we can't clear it up that everybody can go forward with discovery and make the District Court comfortable it is not violating a rule of this court.

THE COURT: They will worry about that?

MR. BLAIR: They have expressed some concern at least in Herstatt.

THE COURT: Within a month this case will either be here or will not be here. If it is dismissed and an appeal is taken, I should think logically an application for a stay of the affect of the dismissal should be made to me or to the District Judge, in the event the appeal goes up quickly.

I am inclined at the moment to adjourn this for a couple of weeks because I fully believe between Judge Lasker and me, we will have disposed of his case and mine, the Israeli Bank and Banque De Financement. All right?

Since you resisted the stay, I don't know necessarily that you would need quarrel with me.

MR. BLAIR: I would agree there is no reason not to let discovery go forward and I agreed with Mr. Shaw there is no reason not to allow a default to be taken in the interpleader for those people who have now gone nine months without a hearing.

THE COURT: All right. I am going to adjourn this to November 11th at eight-thirty in the morning, again. The debtor, in any event, to comply with the scheme of Chapter XI, is directed to file its arrangement by November 10th. I will carry this, also, Mr. Blair.

MR. MARRIN: What time on the 11th, Your Honor?

THE COURT: Eight-thirty.

MR. MARRIN: Is it a holiday?

THE COURT: Do you work November 11th?

MR. MARRIN: Sure.

THE COURT: I have an idea by then you will all be informed on November 11th, this case will be meaningless, frankly.

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TRANSCRIPT: NOVEMBER 11, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of
BANQUE DE FINANCEMENT,

Debtor.

No. 75 B 764

United States Court House
Foley Square, New York, N.Y.

November 11, 1975
8:30 o'clock a.m.

ADJOURNED FIRST MEETING; ADJOURNED XI-4; APPLICATION FOR ORDER TO DETERMINE JURISDICTION, ETC.

Before:

HON. ROY BABITT,
Bankruptcy Judge

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

MUDGE, ROSE, GUTHRIE & ALEXANDER, ESQS.
Attorneys for the Debtor
20 Broad Street
New York, New York

BY: RICHARD B. MARRIN, ESQ., Of Counsel

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PROCEEDINGS

MR. MARRIN: Good morning, Your Honor.

I think we have several matters on the calendar this morning but before that the law firm of Mudge, Rose, Guthrie & Alexander has a statement to make.

As Your Honor is aware, there is an interpleader action pending in the Southern District of New York. It involves a twelve million dollar fund to which numerous parties have made claim. One of the types of claims are depositors of Finnebank (phonetics) in Europe who had C.D.'s invested in Finnebank but belonging in Continental Bank International. Other claimants include general creditors.

In the course of discovery in that action

one of the general creditors had made the allegation that the depositors, or some of them at least, might be conduits for the return of certain funds to a certain person who was a twenty-five percent owner of Finnebank.

Your Honor, we represent Mr. Sindonah (phonetics) in the United States in certain matters. We feel this raises the appearances of impropriety. Beyond that we don't think it does any good to the depositors who are trying to seek their rightful funds back from Finnebank.

We met with our client in Switzerland on Thursday and Friday of last week and asked for permission to withdraw as counsel to which eventually he did consent to. At that time, he also advised us that there is a possibility of outright litigation in Geneva between Mr. Sindonha and Banque De Financement.

In light of this, we are preparing papers for permission to withdraw as counsel or for a substitution of counsel in this affair. I would ask Your Honor - - let me go back one step.

While we were meeting last Thursday and Friday, counsel for Finnebank in Switzerland

spoke to certain attorneys in New York City with a view towards retaining, subjec to court approval, one of them. The gentleman selected, Mr. William P. Ford, is in court this morning. I would hope by the end of this week that we will be able to file with Your Honor an application to withdraw as counsel and for the substitution of Mr. Ford and his firm and various other paperwork that we want to clean up before Your Honor approves it and before we leave as counsel.

I would think to preserve Mr. Ford's position and since Your Honor is, as I understand, in the midst of writing a decision on the motion to dismiss, that we put everything over for two or three weeks and clean up everything meanwhile.

THE COURT: That will include your suit in respect of lifting the stay?

MR. MARRIN: Yes, Your Honor. I think that is a choice that Mr. Ford should make now. If he wants to withdraw it, that's his decision. I would hate to bind him with our decision since we are no longer going to be in the case subject, of course, to you, Your Honor.

THE COURT: December 16th at nine as far

as the suit and the debtor is directed to file its arrangement by December 15th. That's so I comply with the statutory scheme, Mr. Marrin.

MR. MARRIN: Yes, Your Honor.

THE COURT: When will we have those papers for the substitution?

MR. MARRIN: Your Honor, by the end of the week, I hope, at the latest.

We need affidavits from Switzerland and the like, and certain approvals of the commissioners appointed by the Swiss court in Geneva, just so we have a full package to give to Your Honor.

THE COURT: Thank you, Mr. Marrin.

MR. MARRIN: Thank you, Your Honor.

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TRANSCRIPT: DECEMBER 16, 1975

A 209

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of

BANQUE DE FINANCEMENT,

Debtor.

No. 75 B 764

United States Court House
Foley Square, New York, N.Y.
December 16, 1975
9:00 o'clock a.m.

ADJOURNED FIRST MEETING; ADJOURNED XI-4;
ADJOURNED SUMMONS AND COMPLAINT (CONTINENTAL
BANK INTERNATIONAL, ET. A.); SUMMONS AND
COMPLAINT (INVESTITIONS-UND-HANDELSBANK A.G.)

Before:

HON. ROY BABITT, Referee In Bankruptcy

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

APPEARANCES:

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PROCEEDINGS

THE COURT: These are both actions to vacate stays. I am working on my decision in this case and, as you observe, I am bound by Judge Lasker's decision.

In any event, even if I were not, I have independent grounds to dismiss this petition, as improvidently filed, as I had indicated earlier, quite apart from whether or not the case proceeds on appeal.

If I rule on the basis purely of Judge Lasker's decision, you can always file an appeal and make an application for a stay, pending, while that other case of his winds its way up to the Court of Appeals.

In any event, I think I have got enough in the record for independent grounds, which may make a difference on a stay. So, there is really no point now with my proceeding with these things. I would just as soon dismiss the petition and let the pieces fall where they should.

MR. BECKER: May I say one thing? You

mentioned a further stay. Let me address myself to that question.

THE COURT: I don't know what is going to happen. I am merely suggesting, if I dismiss the petition, as I intend to do, an appeal would logically be filed. I suppose an application for a stay pending, should go to the District Court, if and when an appeal is filed. But, why speculate?

My opinion would be that much apart from Judge Lasker's, there would be no basis for an appeal or a basis for a stay of the effect of my judgment anyway.

MR. BECKER: Our argument is premised on the ground there is no authority for the stay at this time.

THE COURT: Because I don't have jurisdiction. A Court always has jurisdiction to determinine its jurisdiction.

MR. BECKER: Our point goes a little further. This is an anti-injunction act, which speaks about the authorization of stays in cases where Congress has expressly authorized it. The usual reference of these kinds

of cases is the Bankruptcy Act, but the express words of the Bankruptcy Act presume, prima facia, on the face of the statute, that the petitioner is a debtor, that is, one capable of becoming a bankrupt.

THE COURT: Of course.

MR. BECKER: They say there is not, at this moment, any authority for a stay.

THE COURT: Of course, there is.

MR. BECKER: We want it vacated today.

THE COURT: Of course, there is. It is case pending in my Court as to which a jurisdictional defect has been alleged, and I have the power to determine whether or not I have jurisdiction. This does not mean that I am bereft of all functions, merely because this debtor doesn't belong in my Court.

MR. BECKER: If there were no federal anti-injunction act, that could well dispose of my point.

THE COURT: I don't know really to what you refer, nor do I understand why that should control in the face of Congressional enactment in the Bankruptcy Act.

MR. BECKER: Well, we have filed a memorandum on the point. Let me spend sixty seconds on it.

THE COURT: Go ahead. I am interested to learn, in any event.

MR. BECKER: There is in Title 28, Section 2283, an old federal anti-injunction act. It goes back to the founding of the country.

THE COURT: Good.

MR. BECKER: It says that except where an act of Congress expressly authorizes a federal court shall not stay a proceeding.

THE COURT: Doesn't an act of Congress authorize it?

MR. BECKER: The Bankruptcy Act does not expressly authorize it.

THE COURT: How about the rules?

MR. BECKER: The rules are surely not an act of Congress.

THE COURT: Sure. They have the force of law.

MR. BECKER: They are not an express act of Congress.

THE COURT: I disagree. If you read the

history of these rules and their transmittal to Congress by the United States Supreme Court and Congress' forebearance, I think they may be considered close to par with an act of Congress.

I admit Congress did not vote on these with the same dotting of each i and crossing of each t as they do on other kinds of business, but these surely have the force of law. I can cite you two cases if you would like -- one is Ecardi v. Shaughnessy, and the other is the United States against Richard Nixon.

MR. BECKER: I don't know that.

THE COURT: You ought to read it.

MR. BECKER: Both of the rules speak of the debtor and the bankrupt. Those words are defined in the basic statute.

THE COURT: They are debtor and bankrupt until I say they are not, or until Judge Lasker says they are not, or until the Court of Appeals agrees with that.

This debtor filed a petition in my Court. If I am now beroft of jurisdiction, you will have to wait until I say so.

MR. BECKER: Alright, Your Honor.

THE COURT: In any event, I could always play nasty and reserve decision and not resolve this --

MR. BECKER: I am not sure I follow you?

THE COURT: Supposing I agree with everything you said, but don't state it as well, but I reserve decision?

MR. BECKER: Yes?

THE COURT: Fine, I will reserve decision and one day, these will fall on their own weight. So, we have just been indulging in an exercise -- you cite me a case and I cite you a case.

MR. BECKER: I would have thought the statute went the other way.

THE COURT: Do you want to get into a hassle whether or not the new bankruptcy rules are paramount to Congressional legislation? I could cite you cases that say they are. And, I could give you cases, my friend, on specific legislation controlling general legislation.

MR. BECKER: I appreciate that. What I have in mind is the view of the Supreme Court

and the Ninth Circuit, when a bankruptcy court seeks to enjoin a state court, and it is held that the bankruptcy court had no jurisdiction over the matter --

THE COURT: Itmay have not jurisdiction when I say it doesn't. Courts always have the power to determine their jurisdiction.

If what you say is true, if a couple came before me to file a Chapter XI, for the sole purpose of getting divorced, again it is an improvidently filed Chapter XI, but wouldn't that have to wait for me to say it, rather than a second wife come in and say I am not bound by you.

Read Ecardi v. Shaughnessy and you will see that the rules have the effect of law. And if you read the transmittal of these rules by the Supreme Court to Congress, you will see they are, indeed, on a statutory level.

MR. BECKER: Alright.

THE COURT: As far as the Chapter XI, I will adjourn it for a few weeks, because I think it will all be disposed of by then.

January 27th, at 8:30, I am going to ad-

journ all these matters to. The debtor is directed to file its plan by January 26th. It's a meaningless, futile direction, but I am compelled by the scheme of the statute to do it. Alright?

MR. FORD: May I address a mechanical question to the Court?

THE COURT: Yes.

MR. FORD: Do I infer, from Your Honor's remarks, that Your Honor would not entertain an application for a stay, but would send this right to the District Court?

THE COURT: I don't know. If an appeal is filed, the discretion lies with me whether to grant the stay. If I refuse, you can always go to a District Judge. All I am suggesting is, if the sole ground of my dismissal of this petition were predicated by Judge Lasker's ruling which is on its way to the Circuit, it would be foolish for me not to stay the matter until the Appellate Court has had an opportunity to study the issue.

If there are sufficient independent grounds, apart from Judge Lasker's, for me to dismiss,

it may be that the appeal would be so bereft of merit, as to not warrant a stay. That's all I am suggesting to anybody.

MR. FORD: Thank you, Your Honor.

THE COURT: You are Mr. --

MR. BECKER: Mr. Becker.

THE COURT: You don't mind if I pirate a copy of your brief. I am most interested in some of these principles of law which take me out of the Bankruptcy Act.

MR. FORD: Not to prolong this, but we respectfully suggest that Mr. Becker's reliance is misplaced.

THE COURT: I am not looking at it. I want to learn something for the future.

Thank you, gentlemen.

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A 220 OPINION OF BANKRUPTCY JUDGE BABITT, DATED JANUARY 12, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter

of

BANQUE DE FINANCEMENT, S.A.,

Debtor.

----------x

75 B 764

OPINION

APPEARANCES:
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-and-
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By: Messrs. Shaw, Jr., Walsh, Jr. and Rosen, of counsel

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By: James C. Blair, Esq., of counsel

ROY BABITT, Bankruptcy Judge:

This opinion is occasioned by a motion made pursuant to Bankruptcy Rule 914, 411 U.S. 1098, applicable in Chapter XI cases by Rule 11-63, 415 U.S. 1039, for an order, pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, applicable to bankruptcy cases by Rule 914 supra, and Rules 712 and 756, 411 U.S. 1074 and 1084, both applicable under Rule 914 supra, dismissing the debtor's petition for relief under Chapter XI of the Bankruptcy Act, Section 301 et seq., 11 U.S.C. §§ 701 et seq. Inasmuch as the determination of the motion will require recourse to matters beyond the petition initiating the Chapter XI case, the motion may properly be considered as one for summary judgment under Rule 12(b) of the Federal Rules of Civil Procedure.

The motion is predicated upon three separate grounds. It is alleged that the debtor is a bank and therefore not subject to the Bankruptcy Laws of the United States, whether as a bankrupt under Chapters I - VII of the Act (straight bankruptcy) or under Chapter XI (debtor relief). The second ground alleged is that the petition

should be dismissed because the debtor has failed, in five respects, to comply with the procedural mechanics of Chapter XI in its failure to make indispensable allegations under the Act and implementing Chapter XI Rules, 415 U.S. 1011 et seq. Finally, the motion requests the Court to dismiss the petition in the exercise of its discretion regardless of whether or not the ground first mentioned above may be sustained.

The motion will be in all respects granted upon the first and third grounds above described, making it therefore unnecessary to determine whether the procedural mandates of the statute, and the rules, are inexorable commands which may not be cured in the appropriate case.

> "To be successful on a Rule 56 application, it must be established that there are no genuine issues of material fact. The responsibility ... on a motion for summary judgment is merely to determine whether there are issues ... via affidavits." Jaroslawicz and Jaroslawicz v. Seedman, ___F.2d___ (2d Cir. December 19, 1975, Docket No. 75-7299) [Slip op. pg. 1135].

Granted that in opposition to the motion I may draw all reasonable inferences in favor of the party against whom summary judgment is sought (the debtor), U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962), I am satisfied that there are no genuine issues of material fact in dispute and that the Chapter XI petition should be dismissed, first as a matter of law upon the ground that this Court lacks subject matter jurisdiction, and secondly, upon the ground that this case is not fit mete for relief under the scheme of Chapter XI and Congress' purpose in enacting that legislation.

And so I turn to the legal considerations involved.

I.

Section 4 of the Bankruptcy Act, 11 U.S.C. § 22, provides in subsection a. that any person except inter alia, a banking corporation, is entitled to the benefits of the Act as a voluntary bankrupt, while subsection b., drawn more broadly, excepts banking

corporations from the result of an involuntary bankruptcy petition. Thus, on the face of Section 4, Congress withdrew from the provisions of the Bankruptcy Act, (at least insofar as straight bankruptcy is concerned), banking corporations, without regard to whether or not they are domestic or foreign.

This explanation does not deal with whether or not an entity disentitled to the provisions of straight bankruptcy may nonetheless avail itself of a debtor relief provision such as is Chapter XI; but swiftly and surely, Section 306(3), 11 U.S.C. § 706(3), provides that a debtor seeking relief under Chapter XI "shall mean a person who could become a bankrupt under section 4 of this Act ...." None will dispute, therefore, that if a banking corporation falls within the exception of Section 4 it cannot be a debtor for relief under Chapter XI, and the debtor refrains, and wisely, from suggesting otherwise. The essence of the debtor's opposition to this prong of the motion is that an

exclusion of foreign banking corporations has not yet been settled and that, therefore, this Court should construe Section 4 to exclude only domestic banking corporations, thus making a foreign banking corporation susceptible of bankruptcy proceedings and, therefore, entitled to seek relief under Chapter XI. The problem with the debtor's position is that that issue has been lain to rest by a Court of sufficiently robust appellate jurisdiction so as to make that ruling binding on this Court.

On October 10, 1975, District Judge Lasker, of this District, sitting as a reviewing Court, Section 39c of the Act, 11 U.S.C. § 67c, and Part VIII of the Bankruptcy Rules, 411 U.S. 1086, et seq., applicable in Chapter XI cases by Rule 11-62, 415 U.S. 1038, reversed an order of a Bankruptcy Judge of this Court and held that the plain language of Section 4a excepted from its reach foreign banking corporations.

An appeal was filed to the Court of Appeals for The Second Circuit, and it is expected that argument will be had shortly. This issue does not, therefore, present a slate free of prior judicial instruction, and my duty, as an inferior Court, is to apply, as best I can, the legal gloss placed on identical facts by my judicial superiors. See U.S. v. A Motion Picture Film entitled "I Am Curious Yellow," 404 F.2d 196 (2d Cir. 1968) Friendly, C.J. concurring at 200.

In consequence, as things now stand, the controlling rule of law in this District is that a foreign banking corporation may not be a bankrupt, from which it follows that it may not be a debtor seeking relief under Chapter XI of the Act. I am obliged to follow that rule of law, with the result that the petition for relief under the scheme of Chapter XI, filed by this debtor on May 5, 1975, must be and the same hereby is dismissed.

II

With commendable candor, erstwhile counsel to the debtor imply that there is a gradual diminution of any

likelihood of compliance with the scheme of Chapter XI enroute to the desired end of that scheme of confirmation of a plan to deal with unsecured creditors. See e.g. Sections 356, 357, 361, 362 and 366 of the Act, 11 U.S.C. § § 756, 757, 761, 762, and 766. The debtor is modest in its lugubrious prognostications of the course this case would take were it to remain in Chapter XI. This Court is satisfied that this Chapter XI cannot comply with the most elementary and preliminary provisions of the Act, much less with successful end result. A recitation of the underlying history which impelled the debtor, not so much to seek final relief under the Act as to obtain the benefits of the automatic and sweeping stay provisions of Rule 11-44, 415 U.S. 1033, is unnecessary. The facts of the matter are that this bank does no business here, its depositors are not here, the bulk of its assets are not here and it is already the subject of comparable proceedings abroad. Plain and simple, the Court finds that the main impulse for this Chapter XI petition was to frustrate the attachments on assets here and, by such filing, render them susceptible of avoidance by the debtor-in-possession exercising all of the rights and powers of

a bankruptcy trustee under Section 342 of the Act, 11 U.S.C. § 742, including the power to void preferences under Sections 60a&b of the Act, 11 U.S.C.§§ 96a&b, or to void liens under Section 67, 11 U.S.C. § 107, for none will argue with the fact that this petition was filed on the very eve of the expiration of the four month period fixed by Congress in the sections above cited, following the attachment of the debtor's assets here. Those attachments arose out of law suits by American banks seeking damages for debtor's alleged breach of contract in connection with the purchase of Swiss francs, and it is clear that the impulse and the timing of the Chapter XI petition were meant to frustrate the provisional remedy of attachment. While this impulse would be in keeping with Congress' scheme, even in Chapter XI, of equality among all creditors, Sampsell v. Imperial Paper and Color Corp., 313 U.S. 215 (1940), the rehabilitative aspects of Chapter XI, and thus achieving the purpose for which that Chapter was enacted, is at least an equally valid impulse. In its broadest

sense, Chapter XI represents recognition of a fundamental economic policy--the rehabilitation of a financially plagued debtor so that it may emerge free of those burdens to resume its place in the commercial world. The Court finds that here there is neither purpose to achieve the desired result nor likelihood of doing so. For one thing, this Court is not even informed, nor has it been, of who the creditors are. There is no basis upon which this debtor can formulate a plan affecting those creditors. And indeed, the debtor is presently in default of filing a plan as directed by the Court, and falls squarely within Rule 11-42(b)(1), 415 U.S. 1031. Clearly, this Court has inherent power to dismiss such a fragile vehicle for Chapter XI relief. In re Ira Haupt & Co. v. Klebanow, 348 F.2d 907 (2d Cir. 1965). This case presents an even more compelling fact pattern in the exercise of this Court's discretion in terminating the debtor's relationship with the Bankruptcy Act than in the Haupt case. This debtor does not do business here and, accordingly, it is evident, there is no business to rehabilitate under Chapter XI and thereby return it to the mainstream of the American

commercial world. The bank has no "going concern" value to preserve because there is no going business.

If there were at least some indication, doing business aside, that this debtor means to come to an accord with its creditors (assuming the Court was told who they were) there would at least be some basis for the Court to stay its hand and permit that process to unfold, but that is not the case. The Court has been given no inkling that this debtor has even considered an accord with creditors (presumably because the creditors, i.e., the depositors, are being dealt with abroad) and the Court finds, on this ground as well, that the sole purpose of this Chapter XI is to frustrate the attachments and nothing more. If there were some basis to believe that this debtor really meant to come to an accord with its general unsecured creditors (putting aside for a moment want of subject matter jurisdiction, see I, supra) this Court might well be constrained to give the debtor time to achieve that end while, at the same time, it voided the attachments and put the American creditors on equal footing with the debtor's foreign depositors.

But there is no such basis, and accordingly, freed of Congress' concern for equality among all creditors in the scheme of the Bankruptcy Act, this Court does not shirk from giving the attaching creditors the advantage over foreign creditors which dismissal of this case will insure. See Disconto Gesellschaft v. Unbrecht, 208 U.S. 570, 582 (1908) where the Supreme Court noted at 582 "... the well recognized rule between states and nations which permits a country to first protect the rights of its citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond its borders." Moreover, the litigation between this debtor and the attaching creditors is already the subject of action in the District Court, where justice will be achieved, all may be certain, at the expert hands of at least two United States District Judges.

III

In light of the foregoing, it is unnecessary for the Court to deal with the technical grounds raised in

the motion concerning the failure by the debtor to comply with some of the procedural rules applicable to Chapter XI cases.

IV

The suggestion by the debtor that Rule 119, 411 U.S. 1015, assuming its applicability to Chapter XI, affords the Court an alternative basis for dealing with this debtor is without merit, for its predicate is the exercise of a jurisdiction which this Court does not have over a banking corporation (Part I supra) and, in any event, is not warranted in the exercise of this Court's discretion. Apart from the fact that Rule 119 uses the permissive "may" rather than the mandatory "shall," the Court is given the option to dismiss, rather than suspend the American proceedings, in favor of having the foreign proceedings go forward. The Court chooses to dismiss, assuming it had jurisdiction at all, so that the foreign proceedings may go forward regardless of their dissimilarity from our own. If there is no remedy under foreign law to void the attachments, then so be it. Certainly these American creditors will not be dismayed by such result.

V.

The motion to dismiss is in all respects granted.[1]

Submit order.

Bankruptcy Judge

Dated: New York, New York

January 12, 1976

1/ In view of the action taken by this decision dismissing the debtor's petition, thereby divesting this Court of jurisdiction, various actions such as that by Investitions- Und Handels- Bank A.G., seeking relief from the automatic stay provisions of Rule 11-44, will fall, as any stays incident to a pending petition will terminate.

ORDER OF DISMISSAL DATED JANUARY 13, 1976

A 236

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re	
BANQUE DE FINANCEMENT, S.A.	No. 75 B 764
Debtor.	ORDER OF DISMISSAL

Upon the grounds stated in the Opinion of this Court, dated January 12, 1976, and upon all the proceedings had herein, it is hereby

ORDERED that the Petition of the debtor Banque de Financement, S.A. for an arrangement pursuant to Chapter XI of the Bankruptcy Act be, and the same hereby is dismissed.

Dated: New York, New York
January 13, 1976

Robert Babitt
BANKRUPTCY JUDGE

TRANSCRIPT OF JANUARY 29, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(In Bankruptcy)

In the Matter
of
BANQUE DE FINANCEMENT,

Debtor.

No. 75 B 764

United States Court House
Foley Square, New York, N.Y.

January 29, 1976
11:00 o'clock a.m.

ORDER TO SHOW CAUSE RE: STAY OF DISMISSAL

Before:

HON. ROY BABITT,
Bankruptcy Judge

BARRY W. RAYVID
Official Court Reporter
U.S. Courthouse (R. 230)
Foley Square, New York, N.Y. 10007

A P P E A R A N C E S :

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1 Chase Manhattan Plaza
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BY: THOMAS A. SHAW, ESQ., Of Counsel

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P R O C E E D I N G S

THE COURT: Now, we have a motion - - well, actually, it is not staying the dismissal, it's staying the import of the order of the dismissal pending an appeal, that is really what it is.

MR. FORD: Yes, sir.

THE COURT: Let's see. There is opposi-

tion from Mr. Boyle of Milbank, Tweed, for the Chase, who is - - he has interposed an opposition. Then there is a memorandum of law from those people in support - -

MR. FORD: Yes, sir.

THE COURT: - - and the motion by the debtor. Okay.

MR. BOYLE: Your Honor, I think we have worked out at least part of the problem.

THE COURT: Okay.

MR. FORD: Good morning, Your Honor.

At the outset I would like to say that with the possible exception of the German bank whom Mr. Becker represents, I believe that Finnabank has come to an accommodation with the other parties here on the terms of a stay, and I believe we worked out all the details but if any of my assumptions are incorrect, Mr. Shaw or Mr. Boyle will fill in the gaps.

THE COURT: I think you misunderstand something. I was reading your memo of law. I think you misunderstand the scheme of Chapter XI by suggesting a separate hearing has to be held each step of the way because if you read

Chapter XI and the statutory commands and look at the notice which goes to all creditors, it tells you at any adjournment thereof a hearing on dismissal may come up at any time.

I mean, if you should appeal, you should not mislead the Court with a little less artfulness in the scheme of the Bankruptcy Act. If you will read the cases on it, such as A&R Distributors, you will observe there need not be a separate notice of dismissal because it's contained in the original notice and it spells clearly to the creditors if at any time the Court feels a prior direction has not been complied with, such as filing a plan or filing acceptances the Court continues its jurisdiction on what is essentially a continuing application to dismiss or to adjudicate.

Now, talk to me.

MR. FORD: Your Honor, essentially our application has three grounds. The first was that we have substantial grounds to appeal.

Secondly, the delay with the terms that we have worked out with the other parties, will not injure anyone and, thirdly, that the lack of

a stay will injure the debror.

THE COURT: How?

MR. FORD: Specifically by an involvement of us in another litigation and by requiring the debtor at some sustantial time and expense to unwind other attachments suits should we be successful on appeal.

I, frankly, submit it is an unnecessary diversion and - -

THE COURT: If I am wrong, everything speaks to the date of the filing, anyway, and it is the date of the filing which determines whether or not if there is ultimately a bankruptcy these attachments should be vacated.

MR. FORD: But I respectfully submit that if there is to be a bankrutpcy proceeding then obviously certain principles of bankruptcy, such as questions of preferential transfers will have to be addressed. If there is not to be a bankruptcy course proceeding, then those considerations can be ignored.

THE COURT: But, I have dismissed the case. There is no bankruptcy now. If I am later reversed for having committed an error of

law or if the Court of Appeals should reverse the precedence upon which I relied to decide it, on the first ground, and if I am wrong on the second ground for dismissal and the petition is reinstated the trustee's ability or even the debtor in possession's ability to void preferences or to set aside attachments would still be pitched to the date of the filing of the petition.

That would not change. That's the cleavage date. That won't change if I am later reversed and held to have improperly dismissed.

You don't get a new petition because if you do get a new petition these attachments are valid and anything that occurred within four months of the other petition, becomes valid. I think you are quite wrong in suggesting that if I am reversed, somehow in that scheme, it will operate in derogation of either the trustee's or debtor's rights.

MR. FORD: I have a slightly different focus. If Your Honor is reversed, the debtor will have to go to some considerable time and expense in defending other actions seeking attachments. If, on the other hand, Your Honor

grants a stay, which most of us here agreed to, we will bring it to the Court's attention and if the Court entertains it, everybody can go up to Judge Wirker's court and it can be worked out there.

Otherwise, the debtor is going to be put to some time and expense in the Federal Court and New York State Courts dealing with these various applications, and I respectfully suggest unnecessarily.

THE COURT: If I stay the affect of the order, what I am really doing is reinstating the stay so that no one can do anything.

MR. FORD: I would suggest that is a fair and reasonable way to do it.

THE COURT: I would agree with you if the sole ground on which I dismissed the petition was based upon the sole factor of Judge Lasker's decision. What troubles me is the second ground.

I would think quite apart from whether or not Judge Lasker is reversed as a matter of law on whether a bank can be a bankrupt and, therefore, a debtor, if he is wrong on that how do I overcome my conclusion this is an improvidently-

filed Chapter XI and should be dismissed regardless of whether the company should be eligible to be a bankrupt or a debtor?

MR. FORD: The better course, I think, if the Court held that view, would have been to hold a hearing on notice.

THE COURT: I just told you that you misapprehend the scheme of the Act. You had a hearing on notice. Not only was there a motion to dismiss but there need not even have been a motion to dismiss because under the unfolding of a Chapter XI, this Court has the power at any time to dismiss or adjudicate without a special hearing being convened for that purpose.

All you have to do is read Section 376, Section 11-42, and the history of the notice of the meetings that went out to creditors, and look at the legislative history and you will see that.

Putting that to one side, I was going to ask you fellows this: To me I think all of this argument is unnecessary; to me there is one pivotal question, should the Court stay the affect of this judgment pending appeal.

What are the criteria by which the Court

at any time grants either an injunction or vacates an injunction? What are the controlling criteria here? - - (A) Irreparable damage, I should suppose; (B) Likelihood of success on the appeal, right?

MR. FORD: Yes, sir.

THE COURT: In other words, the standards to give a stay pending appeal are not any different than the standards to give an injunction in a lower court. So, we need likelihood of success in the action, irreparable damage which is not always a pecuniary consideration and the recent expression by the Court of Appeals for this circuit about the tipping of the balance - - in other words, what are the equities, who is hurt.

There is a great line of cases coming out of this circuit in the last couple of years - - Dino DeLauentis, 366 F. 2d; the Sanders case in 376 F. 2d, great decisions on a recent evolution of injunctive relief and I think that is what we should draw out here.

So, let me ask you this question: If I grant a stay, what will it mean to the creditors, the attaching creditors? - - Probably nothing,

right?

MR. FORD: Yes, sir.

THE COURT: If I vacate the stay, what rights will accrue to that creditor - - the creditors - - vis-a-vis their attachments against the debtor's pecuniary interests?

MR. FORD: Well, I think the essential problem, Your Honor, is that the debtor is going to be put to the trouble and expense of defending a flurry of lawsuits.

THE COURT: So, that's life.

MR. FORD: But, it's unnecessary, Your Honor, because the same debtor can come in to Judge Werker's courtroom - -

THE COURT: Why can't Judge Werker keep the status quo on the interpleader action? In other words, why should I vacate an order dismissing a Chapter XI which, as a matter of law, doesn't stand and which, on the second ground, I have the feeling you can't reverse? In other words, you do not show to me likelihood of success on the appeal.

MR. FORD: Your Honor, I submit the first ground is a substantial ground for appeal, and

certainly this Court knows better than I do, the considerations that have gone into finding whether or not this is subject - -

THE COURT: Granted Judge Werker gets reversed by the Second Circuit. But, I dismissed you for another reason, this is not proper meat for a Chapter XI, you can't come to an accord with your creditors, they are not in this country, you don't know who they are. I say this is not a Chapter XI; it was used for one thing, to keep the umbrella of XI-44.

That is an exercise confided to the Court's judgment. It is based on the Court's findings. How are you going to get that reversed?

MR. FORD: Your Honor, I submit that there are several misconceptions. First of all, the claimants, the customers of Finnabank, to a certain extent are as much in this country as the First National Bank of Boston, whose claim arises out of a transaction in Switzerland or the Chase Manhattan Bank - -

THE COURT: How many creditors did this company have counting the depositors? We are

talking about a Chapter XI. Theoretically the end run is you put through an order of confirmation of a plan that has been accepted by your creditors, right? - - Who are those creditors now? Aren't they depositors all over the world?

MR. FORD: Yes, sir.

THE COURT: Do you know who they are? Have you ever given the Court a list? Don't let me make a record now, that will bar you on the second ground.

MR. FORD: That can be worked out by the appointment of an agent of this court and going over to Switzerland, and I suggest that can be worked out. I also suggest that the focus of the proceeding before Your Honor was really on the first point.

THE COURT: I am not bound by what counsel briefed, my friend.

MR. FORD: I grant you that, Your Honor, but rightly or wrongly, that was the focus. If the focus was misplaced then I submit our client shouldn't suffer for it.

THE COURT: Supposing I refuse a stay pending on the ground I don't think youhave any

prayer on the second ground, and I suspect that Judge Lasker's decision at the moment controls me. That means in terms of the money that these attaching creditors took or attached, can they not be stayed from running with the loot in another forum if I dismiss? If I grant you a stay pending, do I reinstate the Chapter XI? Obviously, I don't.

So, what am I staying? I am, in essence, staying these creditors from cashing in these chips.

MR. FORD: And you are staying anyone else from bringing an action in any other forum other than Judge Werker's courtroom to deal with their claims against us.

THE COURT: And Judge Werker in the interpleader action cannot do this?

MR. FORD: I don't follow Your Honor?

THE COURT: Why would I have to give you the stay under XI-44(a)? Could not Judge Werker stay all creditors from proceeding against you except in the interpleader action?

MR. FORD: You mean on an application to the District Court for a stay pending appeal?

THE COURT: No, an application to the District Court for a stay of the proceeding except as an incident to the interpleader suits. That won't do?

MR. FORD: This is the more efficient and the cheapest vehicle for the debtor to us, Your Honor.

THE COURT: It is also your weakest because I don't think you have shown me likelihood of success on an appeal.

MR. FORD: Well, we think the first ground is a substantial ground, Your Honor.

THE COURT: Not likelihood of success. At least one District Judge says I am right. I am controlled by that. You are predicting it's a substantial ground. It's an arguable ground but you don't show me you are going to reverse me on the second even if Judge Lasker gets reversed on the Israeli Bank.

MR. FORD: I submit out point on appeal was we should have had the opportunity to come into the court and make a showing to the Court as to what we were doing in Switzerland and what the chances were of rehabilitation.

THE COURT: Will you tell the Court of Appeals that everything could be worked out in Switzerland without notice because that's where all the creditors are, where the mechanics or whatever they do over there, are, counsel?

MR. FORD: No, Your Honor, that is exactly the point. We don't say to the Court of Appeals - - there is a substantial fund here and the people - -

THE COURT: It is easier to send the fund across the Atlantic than it is to send all the creditors across the Atlantic.

MR. FORD: I suggest a procedure could be developed.

THE COURT: I suggest you haven't got a great thing. I am not excited either way. I am interesting in knowing if I do grant the stay - - I agree with you there is sort of a presumption let things simmer and no one will get hurt.

But, you haven't shown me how no one will be hurt if you don't have a stay. Have you been hurt until now?

MR. FORD: We have a stay.

THE COURT: Supposing I vacate it now, how would you be hurt?

MR. FORD: Then we go through the litigation and the time and expense of fending off people in other courts, in other forums, Judge, and it's an unnecessary diversion and unnecessary depletion of our estate.

THE COURT: Then what you are really asking me for is not so much a stay of the dismissal, but you are asking me pending appeal, to reinstate the XI-44(a) stay?

MR. FORD: Yes, sir.

THE COURT: Are there any others who wish to be heard?

MR. BOYLE: May I be heard, Your Honor?

Your Honor, we feel that there is no likelihood of success in view of the fact that Your Honor invoked the Court's very broad discretion as previously stated.

We also feel that we will be irreparably injured by a continuation of the standing or the previous stays that were imposed both by the filing of the petition and by specific orders agreed to by Finnabank.

We have had now for a little more than a year, an attachment which was the first attachment filed.

THE COURT: So you shouldn't have had it at all.

MR. BOYLE: Well, Your Honor, for all the reasons that you stated in your opinion, we feel we are entitled to an attachment since bankruptcy is not proper in the United States.

But, in any event, we do have the attachment. We have not been able to take steps to perfect the attachment, and to - -

THE COURT: What does perfection mean?

MR. BOYLE: To gain a judgment from our underlying claim. We have not been able to have discovery, and therefore, we have not been able to press our underlying claim to judgment in order to make ourselves judgment creditors who would be entitled to realize on the assets which we were able to attach.

We think that the time has clearly come when the stay should no longer prevent us from going forward to perfect our attachment and gain the assets to which we are entitled. Secondly -

THE COURT: Are there issues of fact on the suit you would bring or have brought?

MR. BOYLE: We feel that there are no substantial issues of fact.

THE COURT: So, they will fool around with depositions and whatnot?

MR. BOYLE: We interposed an answer which they discussed but as of now they haven't answered our complaint - -

THE COURT: I could let you go to judgment. It seems to me from what I read in the papers here that this is probably ripe for a motion for summary judgment.

MR. BOYLE: I believe it is, Your Honor.

THE COURT: Why couldn't I let them go to get their judgment at least and not execute on it, nor realize on the attachment? I could do this, couldn't I; I could have done it at any time?

MR. FORD: In the State Court?

THE COURT: Or wherever their action is pending.

MR. SHAW: That is precisely what we discussed. Mr. Ford reverted to the fact that

those here, at least we three, have come to some substantial agreement. I don't know how you feel - -

MR. BOYLE: I said I had two points. I got one of them out.

MR. SHAW: I think, maybe, we can come to - - perhaps we can cut this short because I think we all agree if the stay were simply limited to execution on a judgment and that all proceedings could go forward through judgment to execution but not including execution, everybody, at least we three, are in agreement that would be all right. We would all buy that. Is that understood?

THE COURT: I certainly wouldn't let anything go beyond that simply because that would cut against the grain of at least one impulse for the bankruptcy, equality for creditors. We don't look kindly upon those who were first and got the most.

MR. BOYLE: I don't think Chase or First National Of Boston would abscound with any of the assets even if they were allowed to continue through judgment.

THE COURT: There may be a big difference in whether a trustee can go after the liens of the attachments once you have already taken the proceeds, and there may not be a lien. Don't be so glib about that.

MR. BOYLE: I am sure that could be worked out by the parties or by the Court in awarding any judgment. But, the fact is that at this point we think as a practical matter by the time we get through getting to judgment, it is likely that we will have heard from the District Court and therefore, at this time we would not oppose continuation of a stay that affects only execution on a judgment and that's what I told Mr. Ford prior to the hearing.

There is one other problem which I want to mention to Your Honor and that is that we hold certain certificates of deposit and other assets in the name of Finnabank which apparently belong to Finnabank's customers.

These assets as they are held by Chase and by Continental are not the subject of any interpleader action. We have received instructions from Finnabank to transfer those funds.

At about the time we received those instructions Your Honor entered an order which prevented Finnabank from transferring any assets held in its name, even though they might not belong to Finnabank. The question of that specific order and whether that specific order is to survive is important to us because Finnabank has refused to withdraw its instructions to transfer, in spite of Your Honor's order.

It has told its customers in Switzerland that it can do nothing to allow us to transfer those assets and, those customers have consequently brought suit against Chase in Switzerland seeking that they be transferred in violation of Your Honor's order.

Finnabank consented here in New York to Your Honor's order but has left Chase betwixt and between by saying one thing in Switzerland and one thing in New York.

Your Honor, we are prepared to transfer these assets to the customers upon proper proof that they, in fact, do belong to the customers.

THE COURT: That wouldn't be before me. I have no more power to exercise any action on

this and if I were, I would be more inclined to continue the stay regardless of Chase because I don't know - - if this case were not dismissed then - - let's assume I am reversed on both grounds. I don't know that I would look kindly at this point to the disposition of assets to people I don't know or the basis for understanding why they should be entitled to them.

MR. BOYLE: Your Honor, I was going to say nor do we have any problem with continuing to hold the assets provided your order is clear that we must continue to hold the assets. Our problem is in having done so as to the proper status. The time may come when it would be proper for the customers or somebody else to make an application for a lifting of them upon proof as to the ownership of this property.

We have in hand substantial proof with respect to some of these assets that was forwarded by Finnabank along with their instructions to transfer.

THE COURT: I am disinclined - - if we were just arguing this, I would be disinclined to transfer any of the debtor's assets and if I

were to grant a stay, I would keep the status quo as to that and protect you by entering an order forbidding you to take action. I would not allow the disposition of assets. I may get reversed; I may decide to have this case adjudged bankrupt instead of dismissal in which case I would want a trustee in bankruptcy investigating this matter.

Did you want to say something?

MR. BECKER: My name is Joseph Becker and I appear for Investitions Und Handelsbank (phonetics).

THE COURT: You were here in Herstatt?

MR. BECKER: I was, and also here in connection with a prior application by my client to lift a stay and permit us to go forward in the Supreme Court. You may recall footnoting a point.

THE COURT: It became academic?

MR. BECKER: Yes, Your Honor. We are in a somewhat familiar footing, in that the order to show cause was not addressed to us. We received a copy in the mail from Mr. Ford.

I want to bring one matter to your

attention. Immediately after the dismissal of the petition by your order of the 14th and immediately before the temporary restraining order that you entered in this case, we obtained an order of attachment in the New York Supreme Court which was served by the New York Sheriff on the Clerk of the United States District Court here.

There remains for us one of two things to do - - to fully protect this attachment we must serve a summons on the defendant - -

THE COURT: You mean begin your action?

MR. BECKER: Yes, indeed, and we would wish to be free to do that.

THE COURT: All right, that's no problem. Merely service of process we can permit if to do otherwise would prejudice you, provided that by service of the summons you would stipulate that they will not be in default of answer. I don't want the thing to proceed at - - not if it doesn't have to.

MR. BECKER: When I was listening a moment ago, you were speaking about the possibility of an action to proceed short of execution.

THE COURT: They have a suit, issue has

been drawn. It might be ripe for summary judgment.

You are different, you are beginning an action.

MR. BECKER: We wish to serve all those we think hold property.

THE COURT: If under the law this is an indispensable ingredient of the provisional remedies of an attachment, you may be sure you will not be projudiced and if I do grant a stay, it will be fixed in such a way you may proceed to serve process and file your complaint, or whatever they do under the CPLR, but with the understanding that the debtor will not be in default of answer and that other proceedings beyond service of process so that you could protect your attachment will proceed.

MR. BECKER: Exactly.

THE COURT: As far as you people, if I grant a stay it would be a full stay including a stay of your turnover of any funds because the debtor has no power to direct you to do anything like that, only this Court has the power over the debtor's assets.

MR. BOYLE: Thank you for clarifying that.

THE COURT: If I do grant a stay - -

MR. FORD: Before you do that, may I ask a question. I don't mean to divert the Court, but with respect to Mr. Becker, Mr. Becker's client has appeared before Judge Werker and has now instituted a separate suit in the New York State Supreme Court. I am not clear why the separate suit is necessary.

THE COURT: He says under the CPLR he needs the service of process and commencement of an action so that his attachment as a provisional remedy does not fall. It has to be appended to a suit just as an injunction in the Federal Court has to be appended to an action.

MR. FORD: Granted, but could that not be done with the same - -

THE COURT: I don't know what is in the CPLR. I have to assume Mr. Becker is stating he must protect himself by going on that road. If he can protect himself by going on another road let him take it.

MR. FORD: Very well.

THE COURT: I have to accept his word

under the CPLR unless he does (A), (B) and (C) the attachment falls. If he can protect himself by going before Judge Werker, so that everything is here, let him do that.

I am not selling him what to do, but I want to be sure his attachment is not prejudiced if I grant a stay.

MR. FORD: Yes, Your Honor.

THE COURT: Now, you filed a notice of appeal. It should take about five minutes to designate the record, I suspect, since I kept all the records together on the expectation you would appeal.

MR. FORD: Yes, sir.

THE COURT: I have the power under Rule 906 to shorten in time, don't I?

MR. FORD: Yes, sir.

THE COURT: So I could grant you a stay, direct that you designate the record and take whatever procedures are required by Part VIII of the Bankruptcy Rules within, let's say, five days, right?

MR. FORD: Yes, sir.

THE COURT: I could transmit the record to

the District Court hard on the heels of that and then I could under Rule 906 again direct the Clerk of the District Court to shortcircuit Part VIII and place the matter on the District Court Calendar in the Appellate Part or what used to be 506 when I was in the United States Attorney's Office in considerably less time than it would otherwise be.

The rule-makers when they drew up this intricate tapesty didn't know it could be about eighty days before an appeal is heard in the motion part of this building. I am sure they didn't have that in mind.

But, I could shortcircuit that and I could direct that my stay continue until the matter first appears on the District Court's Calendar at which point it will be vacated and superseded by the stay given you by the District Court Judge. In other words, I don't want this thing to linger up there through the realm of adjournment after adjournment after adjournment.

I could do all these things because I think the second point is the pivot of this decision, not the first. If the first is

affirmed of course it's going to the Supreme Court, that is clear. We will play with applications for certs and determinations of granting certs and then putting it on the Supreme Court Calendar assuming the four justices feel it is important enough in the administration of the bankruptcy to warrant review.

MR. FORD: Before you make a decision, I have discussed with Mr. Shaw and I have represented to him I would make an application to the Court to permit as part of any stay, discovery to go forward in the interpleader action.

THE COURT: Go ahead, I don't care if you do that. I saw that. What you do before Judge Werker is all right.

All I am being asked to do is, in essence, stay the affect of my judgment which, in essence, throws the case out of here.

MR. FORD: Yes.

THE COURT: I, by reinstating the stay am doing what XI-44 did. You can always move to modify along the lines of Mr. Becker and this gentleman (indicating) and anything else you want.

So, I could do all these things?

MR. FORD: May I also suggest, Your Honor, that rather than having a record designated within five days by the debtor, if it was seven days, we could all agree?

THE COURT: Fine. It shouldn't be difficult. You have whatever is in evidence, you have the oral argument, you have the motion, you have the Court's decision and the order entered on the decision.

MR. SHAW: Does Your Honor want this record to be part of the record on appeal?

THE COURT: No. If I have given you a stay this is not part of the record.

MR. SHAW: Since the question of a stay will come up under this scheme, before the District Court, perhaps it should be.

THE COURT: This has always been an interesting question around here, whether or not once the appeal goes up to the reviewing court the Court which grants the stay is functus oficio and whether or not I have the power once the appeal is argued to grant the stay pending that decision.

All I had in mind is when the matter is first heard before a District Judge, that the application be made, which I assume won't be opposed, that the stay I enter now be granted by him. I think there is a question of how far my power runs.

If this record had been docketed, I think I would have been without power to grant a stay. At least, analogizing to the difference to what happens when an appeal is filed from the District Court, the record is given to the circuit and I think the District Judge is functus oficio at that point.

MR. SHAW: The Bankruptcy Judge?

THE COURT: No, I am talking if there were an appeal from the District Court to the Court of Appeals. Once the record is docketed I think the District Judge whose orders is being appealed is functus oficio and it would become the function of a circuit judge to grant a stay.

Judge Lombard used to question that in the United States Attorney's Office and insist we go through a United States Judges before he would act in the circuit.

But, I will give you a stay along the lines we discussed including the shortening of time so that the appeal could be noticed before the District Court probably sometime now in February. At that time the District Judge should continue the stay, as I will imagine he will, and await a decision because the Israeli Bank is being argued up there mid-February, I am told.

MR. SHAW: That is what I think, Your Honor.

THE COURT: He will probably reserve decision and then the matter is subjudice before the circuit then I think the judge should be told there is an independent ground for dismissal that he will have to cope with and that might take some time to decide and that basically, he should continue the stay once you get up there.

I will give you the stay conditioned upon its termination, as far as I am concerned, when the matter is first heard before the District Judge and I am certain the District Judge, perhaps having a little less than an expert feel of bankruptcy that is attributed to me, frequently wrong, will be delighted to keep the status quo

while it's subjudice before him.

MR. FORD: Thank you, Judge.

THE COURT: Then, the record will be designated by February 6th and I will cause it to be transmitted to the clerk of the District Court by the 9th or 10th, and I will enter an order for Mr. Burghardt and direct him to place it on the District Court Calendar for the first available Tuesday in the month of February, which will probably be the 17th, or so. That does not mean the District Judge will hear it, because I do not believe that I have the function to control their calendars. But, at least it conditions the reach of my stay until the matter is first heard before a District Judge. The date is noticed by the clerk of the District Court.

If there is an application for an adjournment, I am certain the judge will continue the stay.

MR. HORAN: We were not on Your Honor's opinion.

THE COURT: You had a suit to vacate the stay?

MR. HORAN: That is correct. Mr. Ford did not include us as parties. The record should indicate with respect to our client we are in this proceeding, such as it is, on the way to the District Court.

THE COURT: In other words, your suit under Part VII of the rules to permit you to proceed elsewhere fell when I dismissed the petition?

MR. HORAN: Correct.

THE COURT: You are now saying if I am going to grant a stay at least you be given some recognition? In other words, you must do something to perfect your attachment?

MR. HORAN: Exactly.

THE COURT: You have done nothing?

MR. HORAN: We wish to be part of the settlement of whatever order is signed staying and we are not, strictly speaking, appearing because we weren't part of the dismissal petition.

THE COURT: I understand. If I am reinstating a stay now you are merely telling the Court you, too, have an interest here?

MR. HORAN: That is correct.

THE COURT: And you would like to protect yourselves, notwithstanding the stay by doing whatever you have to do under the CPLR?

MR. HORAN: And we be in the stay as Your Honor has already outlined.

THE COURT: Mr. Ford, why don't you settle the order in keeping with what we had structured before me in chambers on a day I will give you next week?

MR. FORD: Yes, sir.

THE COURT: Then we will all get together and if there are any jots and tiddles for us to wind up, we will.

MR. FORD: Yes, sir.

MR. SHAW: I think, Your Honor, it would be helpful if we work together and designate this record.

THE COURT: I don't think there is anything to designate. I did it for you. I told my clerks outside to keep the file intact.

MR. SHAW: It will be everything - -

THE COURT: As I understand an appeal, you go up on the record below. I have a case on appeal where a party put in an affidavit after

I heard the trial. Obviously if I am going to decide a case, it's on the record and if it goes up on appeal that is the record.

MR. SHAW: Your Honor has already segregated what you consider to be the record?

THE COURT: The record in this case on this issue is very simple, those things that were before me.

MR. SHAW: The question in my mind is whether those things that came to you after the argument - -

THE COURT: Like what?

MR. SHAW: There were various adjourned dates at which directions were given by you.

THE COURT: To do what?

MR. SHAW: Which may relate to the second part of your decision.

THE COURT: You mean the continuing life of the XI?

MR. SHAW: Yes.

THE COURT: I would suppose without having been asked - - certainly, if I have purported to exercise my discretion, you would have to tell the Court of Appeals the scheme of Chapter XI,

that the Court makes directions and that these were not honored, and so on.

MR. SHAW: I am not sure whether there were transcripts made.

THE COURT: Sure. Every time you were on in a statutory hearing, and the dates on that, you can get from the dockets, that is the scheme of Chapter XI. You fellows may not be familiar with it.

Mr. Rayvid will, undoubtedly, type up the proceedings in every Chapter XI because number one, that is how he earns his living now and that's how it is done. The way you will find out when it is on is by looking at our dockets and you will see entries such as XI-4 held and adjourned to whatever date, with whatever directions.

MR. SHAW: Mr. Ford said that he thought they hadn't been typed up.

THE COURT: I think we should settle the record before me. Do you want to settle it for Tuesday, February 3rd, in my chambers, at half-past ten or on February 4th in my chambers at seven-thirty; February 5th at eight o'clock;

or February 6th at any time because I have no calendar?

MR. FORD: The 5th at eight.

MR. SHAW: That is good.

THE COURT: I have a calendar at eight-thirty. If things are not thoroughly concluded, I don't want you sitting around. It will be at eight o'clock in chambers?

MR. FORD: I expect we will have agreed on the terms.

THE COURT: But, the fact that I am signing the order on the 5th does not in any way alter the decretal paragraph as to the docketing of the record by the 6th.

The motion is granted to the extent described on the record.

Thank you, gentlemen.

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NOTICE OF APPEAL TO DISTRICT COURT

A 273

Filed 1/14/76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAN 14 '76

BANKRUPTCY JU

In re

BANQUE DE FINANCEMENT, S.A.

Debtor.

No. 75 B 764

NOTICE OF APPEAL TO DISTRICT COURT

PLEASE TAKE NOTICE that the Banque de Financement, S.A., Debtor, appeals to the District Court from the Order of Bankruptcy Judge Babitt entered in this case on January 13, 1976 which dismissed the Petition of the Banque de Financement, S.A. for an Arrangement pursuant to Chapter XI of the Bankruptcy Act.

The parties to the Order appealed from and the names and addresses of their respective attorneys are as follows:

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MUDGE ROSE GUTHRIE & ALEXANDER
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Dated: New York, New York
January 14, 1976

GRUNEWALD, TURK, GILLEN & FORD

By: _____
A Member of the Firm

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(212) 964-1400

ORDER EXTENDING STAY PENDING APPEAL DATED JULY 13, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

In re :

: No. 75 B 864

BANQUE DE FINANCEMENT, :

:

Debtor. : ORDER EXTENDING STAY PENDING APPEAL

----------X

Upon all the proceedings had herein,

IT IS HEREBY ORDERED, that the stay heretofore entered by Bankruptcy Judge Babitt on February 5, 1976 be, and it hereby is, extended pending the determination by this Court of this appeal.

Dated: New YOrk, New York
July 13, 1976

ROBERT J. WARD, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

In the Matter :

of : 75 B 764

BANQUE DE FINANCEMENT, S.A., :

Debtor-Appellant.

----------x

Debtor-appellant Banque de Financement, S.A. (hereinafter "Finabank") seeks review of the order of Bankruptcy Judge Roy Babitt dated January 12, 1976 dismissing its petition for relief under Chapter XI of the Bankruptcy Act, Section 301 et seq., 11 U.S.C. §§701 et seq. For the reasons hereinafter stated, the order is affirmed.

Finabank is a Swiss banking institution doing no business and having no offices in the United States. Part of its banking business involved arbitrage in foreign exchange - the simultaneous purchase and sale of foreign currency futures in which it sought to profit from differences between the sales price and the purchase price.

In late 1974, Edilcentro Bank Ltd. (Nassau), with which Finabank had foreign exchange contracts in the aggregate amount of 120,000,000 Swiss Francs ($46,250,000) defaulted on

its obligations leaving Finabank without the necessary funds to complete complementary contracts with appellees Chase Manhattan Bank, N.A. (hereinafter "Chase") and First National Bank of Boston (hereinafter "Boston Bank").

Chase and Boston Bank, in January 1975, attached funds standing in Finabank's name in this district. At about the same time Finabank filed a petition for a "sursis bancaire" (Postponement of Maturity) in Geneva, Switzerland. A moratorium was imposed on Finabank's conduct of its business pending, inter alia, a determination regarding Finabank's capacity for rehabilitation. Finabank is presently seeking to recover $46,500,000 in connection with the Edilcentro Bank default.

Thereafter, Finabank and its Swiss court-appointed Temporary Commissioner filed the instant petition for relief under Chapter XI assertedly to assist in Finabank's rehabilitation by blocking the seizure of certain Finabank assets located in the United States. It was petitioners' expressed hope that a plan could be arrived at in Switzerland which would then have been submitted in the Chapter XI proceedings as a proposed plan and which, if approved, would result in a joint administration of all assets located in the United States and Switzerland. Before a proposed plan was filed, Judge Babitt dismissed the petition.

Although dismissal was predicated on two grounds, first that the debtor is a bank and therefore not subject to the Bankruptcy Laws of the United States, and second as a matter of discretion, this opinion will address only the latter ground since this Court finds that the debtor is subject to the Bankruptcy Laws. See In re Israel-British Bank (London) Ltd., No. 75-5020 (2d Cir. May 25, 1976).

Finabank urges that Judge Babitt erred in not conducting a hearing as required by Rule 11-42(b)(1)[1] of the Federal Rules of Bankruptcy Procedure before dismissing the petition. However, this Court has reviewed the record and finds that Finabank had a full opportunity to be heard and to present any facts or contentions which it desired to present. Although no evidentiary hearing was held, none was required since the underlying facts were undisputed.

On June 10, 1975, at the very first hearing before Judge Babitt after the petition was filed, Finabank's counsel conceded that there were "certain problems over in Switzerland in deals with other banks that make it very unlikely we can ever put over a Chapter XI in this situation," and at the August 19, 1975 hearing on the dismissal motion, Finabank conceded in its brief that, since the filing of the petition, "the feasibility of structuring a plan acceptable to all creditors has gradually diminished," and referred to "the slim likelihood at present of the successful formulation of a plan." At

the latter hearing, Judge Babitt specifically commented that Finabank's continued failure to file a proposed plan would be grounds for dismissal as follows:

> Does anyone doubt that I could not now adjudicate you a bankrupt because you didn't file a plan or dismiss it on the ground you didn't file a plan? No one doubts this right.

Thus, Finabank did address the issue of a plan of rehabilitation at hearings before the Bankruptcy Court, and its counsel's concessions coupled with its continued failure to file a proposed plan lend support to the Judge's finding of failure to prosecute. However, Finabank contends, contrary to Judge Babitt's finding that it was "in default of filing a plan as directed by the court and [thus fell] squarely within Rule 11-42(b)(1)," that it had, as of the date of his opinion, two weeks more to file a plan. Assuming, arguendo, that Finabank was not in default of filing a plan, Judge Babitt nonetheless was empowered to dismiss the Chapter XI petition upon his determination "that there is no prospect of rehabilitation and that ordinary bankruptcy [or Chapter X] is the appropriate vehicle."[2] Ira Haupt & Co. v. Klebanow, 348 F.2d 907, 908 (2d Cir. 1965).

Judge Babitt's finding, ". . . that here there is neither purpose to achieve the desired result [a rehabilitation plan] nor likelihood of doing so, . . ." is clearly supported by the concessions of Finabank's counsel set forth above.

As Judge Babitt also pointed out, "this bank does no business here, its depositors are not here, the bulk of its assets are not here and it is already the subject of comparable proceedings abroad." The Bankruptcy Judge went on to find "that the main impulse for this Chapter XI petition was to frustrate the attachments on assets here. . . ." a finding which is supported by the record.

Moreover, the debtor was legally prohibited by Swiss law[3] from disclosing the names of a certain type of creditor, its creditor-customers, and although it proposes to cure this deficiency by giving each creditor-customer notice of the pendency of this proceeding and his right to file claims, the Bankruptcy Judge was within his discretion in rejecting this proffered alternative.

Finally, Finabank challenges Judge Babitt's dismissal of the case under Rule 119 of the Federal Rules of Bankruptcy Procedure. Rule 119, which all parties concede is applicable to this case, provides that a court of bankruptcy, in a case where a proceeding for rehabilitation has been commenced by a bankrupt in a foreign court, may:

> . . . having regard to the rights and convenience of local creditors and other relevant circumstances, dismiss a case or suspend the proceedings therein under such terms as may be appropriate.

The test is whether a local administration is either "necessary or desirable." See Nadelmann, The American Bankruptcy Act and Conflicting Administrations, 12 Int. & Com. L.Q. 684, 685 (1963).

Finabank asserts that maintaining the proceedings here, by means of Rule 119 suspension, was necessary to protect the creditors and to insure that the assets located here are equally distributed among all the creditors, and submits that it was inappropriate for the court to abandon the creditors by dismissing the case, an action which permits the attachments to stand. However, as to "the rights of local creditors," there appear to be only four American creditors, Mario Einaudi upon whose claims of direct ownership of interpleaded funds totalling $160,000 Judge Werker has granted summary judgment in the interpleader action; First National City Bank which claims $138,803; and Boston Bank and Chase whose claims total approximately $10,000,000 of the $12,500,000 standing in Finabank's name in this district. With the possible exception of First National City Bank's relatively minor claim, dismissal has no adverse effect on the American creditors but to the contrary, represents a step toward assuring that they will each recover the sums due them without having to rely on Swiss bankruptcy procedures which are enmeshed with the Swiss bank secrecy laws. Thus, contrary to Finabank's

contention, the claims of local creditors appear best protected by dismissal of the case.

The Bankruptcy Judge also considered the effect of dismissal on foreign creditors and concluded:

> . . . this Court does not shirk from giving the attaching creditors the advantage over foreign creditors which dismissal of this case will insure. See Disconto Gesellschaft v. Unbrecht, [sic] 208 U.S. 570, 582 (1908) where the Supreme Court noted at 582 ". . . the well recognized rule between states and nations which permits a country to first protect the rights of its citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond its borders."

Considering all of the foregoing and upon review of the entire record, the Court finds that the Bankruptcy Judge acted within his discretion in dismissing the case. Accordingly, the granting of the motion to dismiss on the second ground is affirmed and the stay is vacated.

It is so ordered.

Dated: July 28, 1976

Robert A. Ward
U. S. D. J.

NOTES

1 Rule 11-42(b)(1) permits the Bankruptcy Court, "after hearing," to enter an order dismissing the case "for want of prosecution," which includes failure to propose a plan of rehabilitation.

2 It is undisputed that an "appropriate" proceeding, a "sursis bancaire" (Postponement of Maturity), instituted by Finabank's own petition and contemplating its rehabilitation, is pending before the Geneva Court of Justice.

3. Article 273, ¶2, Swiss Criminal Code; Article 47, Swiss Federal Banking Law.

Filed
USDC
July 29-76
SDNY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter :
of :
BANQUE DE FINANCEMENT, S.A., :
Debtor-Appellant. :

75 B 764

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Banque De Financement, S.A. ("Finabank"), hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of Judge Robert J. Ward in this matter dated July 28, 1976 affirming the dismissal by Bankruptcy Judge Babitt on January 14, 1976 of the Petition of Finabank, for an Arrangement Pursuant to Chapter XI of the Bankruptcy Act.

Dated: New York, New York
July 29, 1976

FORD MARRIN ESPOSITO WITMEYER & BERGMAN

By: _____
A Member of the Firm
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A 286

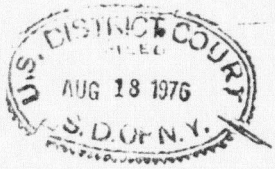
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(Ward)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

BANQUE DE FINANCEMENT, S. A.,

Debtor-Appellant.

75 B 764 (Ward)
CONSENT
ORDER WITH STAY
PENDING APPEAL

Upon the consent of Appellant and Appellees to a stay pending appeal, and upon all prior proceedings in this matter, it is hereby

ORDERED that the stay of actions against Debtor and Lien Enforcement pursuant to Rule 11-44 is hereby continued pending further order of the United States Court of Appeals for the Second Circuit or the United States District Court for the Southern District of New York; and it is further

ORDERED that the three actions presently pending in the United States District Court for the Southern District of New York before Judge Henry F. Werker to which the Debtor-Appellant is a party, consolidated under the title Chase Manhattan Bank, N.A. v. Banque de Financement, S.A., 75 Civ. 39, be permitted to proceed through judgment to but not including execution of judgment and disbursement of funds by Continental Bank International, pending further order of the United States Court of Appeals for the Second Circuit or the United States District Court for the Southern District of New York; and it is further

ORDERED that the Debtor be, and hereby is, prohibited from transferring or allowing to be transferred any funds or other property of any nature whatsoever presently on deposit in or located in the United States, including any funds or other property standing in its name which it or others assert are not owned by it beneficially, or otherwise held by it in a fiduciary capacity,

except upon written order of the United States Court of Appeals for the Second Circuit or the United States District Court for the Southern District of New York after notice authorizing such transfer, for so long as the stay provided for in this order is outstanding.

Dated: New York, New York
August 16, 1976

Robert J. Ward
U. S. D. J.

The above order is consented to:

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FORD MARRIN ESPOSITO WITMEYER & BERGMAN

By
A Member of the Firm
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By
A Member of the Firm
Attorneys for the Bank Firestone Limited
One State Street Plaza
New York, New York 10004

PROOF OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Laura Roger , being duly sworn deposes and says:

1. I am over 18 years of age and am not a party to this action.

2. On October 1 1976, I served the foregoing Joint Appendix upon all counsel

by depositing [a] true copy [ies] thereof in an official depository under the exclusive care and custody of the United States Postal Service located at 25 Broadway, New York, New York, each enclosed in a postpaid wrapper, which wrapper[s] [was] [were] addressed as follows:

James C. Blair, Esq.
Cleary Gottlieb Steen & Hamilton
One State Street Plaza
New York, New York 10004

Roger Boyle, Esq.
Milbank Tweed Hadley & McCloy
One Chase Manhattan Plaza
New York, New York 10005

Thomas Shaw, Esq.
Breed, Abbot & Morgan
One Chase Manhattan Plaza
New York, New York 10005

Laura Roger

Sworn to before me this
1st day of October 1976.

Irene Mansoura (Cohen)
Notary Public

IRENE MANSOURA
NOTARY PUBLIC, State of New York
No. 24-4507262
Qualified in Kings County
Commission Expires March 30, 1978